TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~5960~~. 571

GEORGE L. WHEELER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

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1 Be it remembered that at a term of the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit, begun and held at the city of Paris, in said district, on the nineteenth day of November, A. D. 1894, present and presiding, the Honorable David E. Bryant, United States district judge, and which term adjourned on the fifth day of January, A. D. 1895, the following cause came on for trial, to wit:

THE UNITED STATES }
662. *vs.* } Charge: Murder.
GEORGE L. WHEELER. }

2 Be it remembered that on the third Monday of November, A. D. 1894, the same being the nineteenth day of said month, there was begun and holden at the court rooms in the city of Paris, Texas, a regular term of the honorable circuit court of the United States for the eastern district of Texas, when the following proceedings were had, to wit:

MONDAY, *November 26th*, 1894.

Court met pursuant to adjournment.

Present and presiding, Hon. D. E. Bryant, judge; also present, R. E. Hannay, esq., U. S. atty.; S. Taliaferro, asst. U. S. atty.; J. S. Williams, marshal, and C. Dart, clerk, by H. H. Kirkpatrick, deputy.

This day came the grand jury, and, a quorum being present, presented in open court the following bills of indictment, to wit:

THE UNITED STATES }
662. *v.* } Charge: Murder.
GEORGE L. WHEELER. }

Each of which bills of indictment the clerk is ordered to file and enter upon the proper dockets.

3 In the name and by the authority of the United States of America.

In the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit.

At a stated term of the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit, begun and held at Paris, Texas, within and for the district and circuit aforesaid, on the third Monday, the same being the nin'teenth day of November, in the year of our Lord eighteen hundred and ninety-four, and continued by adjournment to and including the twenty-sixth day of November, in the year of our Lord eighteen hundred and ninety-four.

Eastern district of Texas, sct.: The grand jurors of the United States of America, duly elected, impaneled, tried, sworn, and charged to inquire into and due presentment make of offenses against the laws of the United States of America, in and for the district and circuit aforesaid, on their oaths in said court present: That one George L. Wheeler, late of the Chickasaw Nation, Tishomingo County, Indian Territory, in the district

and circuit aforesaid, on the 12th day of June, in the year of our Lord eighteen hundred and ninety-four, in Tishomingo County, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit and annexed to and constituting a part of the eastern district of Texas for judicial purposes, and
4 being within the jurisdiction of this court and under the exclusive jurisdiction of the United States, did unlawfully, fraudulently, and feloniously, and with malice aforethought, and with a certain deadly weapon, to wit, a certain gun then and there held, make an assault in and upon the body of one Robert McCabe with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said George L. Wheeler did then and there shoot off and discharge the contents of said gun at, in, and upon the body of said Robert McCabe, inflicting thereon a mortal wound, of which mortal wound the said Robert McCabe did languish, and languishing did then and there instantly die.

And the said grand jurors aforesaid, upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, used as aforesaid, and in the manner aforesaid, the said George L. Wheeler did unlawfully, feloniously, and with his malice aforethought, kill and murder the said Robert McCabe. The said Robert McCabe and the said George L. Wheeler being then and there white persons and not Indians nor citizens of the Indian Territory, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

T. A. McNEILL,
Foreman of the Grand Jury.
S. TALIAFERRO,
Asst. U. S. Attorney, Eastern District of Texas.

5 (Endorsed:) No. 662. The United States vs. George L. Wheeler. Offense: Murder. A true bill. T. A. McNeill, foreman of the grand jury. U. S. witnesses:

Sally McCabe, Waxahatchie, I. Ty.
Walter McCabe, " "
S. M. Myrick, Tishomingo, I. Ty.
J. C. Shelton, " "
D. E. Booker, Ardmore, "
John Couch, Tishomingo, "
Dan Taylor, " "
Old man Craddock, near Wynnewood.

Returned and filed in open court 26th day of November, 1894. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

(Further endorsed:) U. S. witnesses, continued:

Henry Walden, Tishomingo, I. Ty.
Zeke Crisp, Reagan, Choctaw Nation.
John Taylor, Tishomingo.

(Further endorsed:) We, the jury, find the defendant, George L. Wheeler, guilty of murder in the Indian country, as charged in the indictment. Dec. 22nd, 1894. H. B. Love, foreman.

FRIDAY, *December* 21*st*, 1894.

Court met pursuant to adjournment.

Present and presiding, Hon. D. E. Bryant, judge; also present, R. E. Hannay, esq., U. S. atty.; S. Taliaferro, esq., asst. U. S. atty.; J. S. Williams, marshal, and C. Dart, clerk, by H. H. Kirkpatrick, deputy.

6 THE UNITED STATES)
vs.) No. 662. Circuit court, criminal docket.
GEORGE L. WHEELER.)

This cause coming on this day to be heard, came the United States, by her attorney, and announced ready for trial, and the defendant, George L. Wheeler, in his own proper person and by attorney, appeared and announced ready, and the said defendant being arraigned, plead not guilty, and thereupon came a jury of twelve good and lawful men, to wit:

H. B. Love, G. B. Dean, A. R. Moore, F. A. Tisdel, D. A. Bright, M. C. Smith, P. T. Wood, W. A. Cox, G. W. Flood, T. O. Proctor, J. M. Buchanon, and Wm. Cocke, who, having been duly tried, impaneled, and sworn as required by law, and having heard the evidence and part of the argument of counsel, and the hour of adjournment having arrived, the jury was duly instructed, placed in charge of a bailiff for the night, and further consideration of this case was postponed until to-morrow.

SATURDAY, *December* 22*d*, 1894.

Court met pursuant to adjournment.

Present and presiding, Hon. D. E. Bryant, judge; also present,
7 R. E. Hannay, esq., U. S. atty.; S. Taliaferro, esq., asst. U. S. atty.;
J. S. Williams, marshal, and C. Dart, clerk, by H. H. Kirkpatrick, deputy.

THE UNITED STATES)
vs.) No. 662. Circuit court, criminal docket.
GEORGE L. WHEELER.)

This cause coming on this day to be further heard, came the United States, by her attorney, and the defendant, George L. Wheeler, in his own proper person and by attorneys appeared, and thereupon came a jury of twelve good and lawful men, to wit:

H. B. Love, G. W. Flood, M. C. Smith, A. R. Moore, J. M. Buchanon, W. A. Cox, D. A. Bright, G. B. Dean, T. O. Proctor, P. T. Wood, F. A. Tisdel, and Wm. Cocke; who, having been on yesterday duly tried, impaneled, and sworn as required by law, and having heard the evidence and part of the argument of counsel, and on this day heard the balance of the argument of counsel and received the charge of the court, retired to consider of their verdict, and on this day brought into open court their verdict in words and figures as follows, to wit:

We, the jury, find the defendant, George L. Wheeler, guilty of murder in the Indian country, as charged in the indictment.

H. B. LOVE, *Foreman.*

Dec. 22nd, 1894.

8 It is therefore considered by the court that the defendant, George L. Wheeler, is guilty of murder as charged in the indictment and as found by the jury, and it is ordered that he be remanded to the custody of the marshal to await the judgment and sentence of the court.

In the circuit court of the United States for the eastern district of Texas, holding sessions at Paris, Texas, in said district.

THE UNITED STATES *vs.* GEORGE L. WHEELER } No. 662.

And now comes the defendant, George L. Wheeler, in the above styled and numbered cause, and moves the court to arrest the judgment in the said cause and for the following reasons, to wit:

First. Because the indictment alleges that the said defendant, George L. Wheeler, and Robert McCabe, the party alleged to have been killed, were both white persons and not Indians nor citizens of the Indian Territory; when the same should allege that the said Wheeler and the said McCabe were white persons, and not Indians nor citizens of any Indian tribe or nation.

Second. Because the said bill of indictment in this case does not anywhere allege or set out the *the* party alleged to have been killed died of the mortal wounds inflicted by the said defendant.

JOHNSON & LEE,
Attys. for defendant.

9 (Endorsed:) 662. V. G. L. Wheeler. Filed Dec. 22, '94. C. Dart, clk., by Mel Kirkpatrick, dpty.

In the circuit court of the United States for the eastern district of Texas, holding sessions at Paris, Texas, in said district. November Term, A. D. 1894.

THE UNITED STATES *vs.* GEORGE L. WHEELER. } No. 662.

Now comes the defendant, George L. Wheeler, in the above styled and numbered cause, and asks the court to grant him a new trial in the said cause and for the following reasons, to wit:

First. Because the verdict of the jury is contrary to the law and evedence.

Second. Because the court erred in his charge to the jury on the law of self defense in this, to wit: that he failed to charge that the defendant had the right to act upon the appearance of danger, and that if it reasonably appeared to him that he was in danger of life or serious bodily harm he had the right to avert the threatened danger by taking the life of his adversary, whether the said danger was real or not.

Third. Because the court erred in excluding from the jury, and refusing to admit the testimony of John Wheeler when offered by the defendant.

10 Fourth. Because the court erred in admitting the testimony of Walter McCabe over the objection of the defendant.

Wherefore defendant asks that a new trial be granted for reason of the errors above set out.

Respectfully submitted.

JOHNSON AND LEE,
Attorneys for Deft.

(Endorsed:) No. 662. The United States vs. George L. Wheeler. Motion for a new trial. Filed Dec. 24, '94. C. Dart, clerk, by Mel Kirkpatrick, deputy.

TUESDAY, *January 1st*, 1895.

Court met pursuant to adjournment. Present and presiding, Hon. D. E. Bryant, judge; also present, R. E. Hannay, esq., U. S. atty.; S. Taliaferro, esq., asst. U. S. atty.; J. S. Williams, U. S. marshal, and C. Dart, clerk, by H. H. Kirkpatrick, deputy.

THE UNITED STATES
v.
GEO. L. WHEELER. } No. 662.

On this day came to be heard defendant's motion for a new trial herein, and the same having been duly considered by the court, because it is the opinion of the court that the law is against the defendant, the motion is overruled and a new trial herein is denied the defendant, whereupon in open court the defendant excepts.

11 WEDNESDAY, *January 2d*, 1895.

Court met pursuant to adjournment. Present and presiding, Hon. D. E. Bryant, judge; also present, R. E. Hannay, esq., U. S. atty.; S. Taliaferro, esq., asst. U. S. atty.; J. S Williams, U. S. marshal, and C. Dart, clerk, by H. H. Kirkpatrick, deputy.

THE UNITED STATES
v.
GEORGE L. WHEELER. } 662.

On motion of R. E. Hannay, esq., attorney of the United States for the eastern district of Texas, the above-named defendant, George L. Wheeler, was this day brought to the bar of the court in custody of the marshal, and, being asked by the court, in open court, if he had anything to say why the judgment and sentence of the court should not be pronounced upon him in accordance with the verdict of guilty returned by the jury in this cause on the 22d day of December, A. D. 1894, and the law in such cases made and provided, and no good cause being shown why the judgment and sentence of the court should not be pronounced herein, it is therefore considered by the court that the defendant, George Wheeler, is guilty of murder as charged in the indictment and as found by the jury, and it is ordered, adjudged, and decreed by the court that the defendant, George L. Wheeler, be now remanded to the custody of the marshal of

the United States for the eastern district of Texas and be by him committed to the jail of Lamar County, Texas, and there kept securely confined until Friday, the 29th day of March, A. D. 1895, when,
12 between the hours of ten o'clock a. m. and four o'clock p. m. of said day, he, the said George L. Wheeler, shall be taken therefrom by the marshal aforesaid to the yard of the said jail and then and there be, by the marshal aforesaid, hanged by the neck until he, the said George L. Wheeler, is dead.

And the clerk of this court is ordered to issue a death warrant, directed to the marshal aforesaid, commanding the due execution of this judgment and sentence according to law.

To which judgment of the court defendant then and there in open court excepted.

THE UNITED STATES
vs.
GEORGE L. WHEELER. } No. 662.

Because motion for new trial in the above styled and numbered cause was overruled on the last day of the term at which the defendant, George L. Wheeler, was convicted, and the time and difficulty incident to preparing bill of exceptions, etc., sixty days from the adjournment of the said term of court are hereby allowed defendant in which to file petition for writ of error, bill of exceptions, assignment of error, etc.

DAVID E. BRYANT, *Judge.*

This March 1st, A. D. 1895.

(Endorsed:) Filed March 2, 1895. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

13 In the circuit court of the United State for the eastern district of Texas, holding sessions at Paris, Texas.

THE UNITED STATES
vs.
GEORGE L. WHEELER. } No. 662.

To the Hon. David E. Bryant, judge of said court:

Now comes the defendant herein, and desiring to have the above styled and numbered cause re-examined, reversed, or affirmed by the Supreme Court of the United States of America upon a writ of error, hereby asks that the said writ of error be sued out and granted, in accordance with the statutes in such ca-es made and provided.

JOHNSON AND LEE,
Attorneys for the Defendant.

Allowed, this March 1st, 1895.

DAVID E. BRYANT, *Judge.*

(Endorsed:) No. 662. The United States vs. George L. Wheeler. Petition for issuance of writ of error. Filed March 2, 1895. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

In the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit, holding sessions at Paris, Texas, November term, A. D. 1894.

THE UNITED STATES)
vs.) No. 662.
GEORGE L. WHEELER.)

And now on the 11th day of January, A. D. 1895, and within sixty days after the adjournment of the November term of court, comes
14 George L. Wheeler, the defendant in the above styled and numbered cause, and files this his assignment of error, and says that on the trial of the said cause in the said trial court there were numerous and manifest errors committed to the great prejudice of the defendant, which said errors were duly complained of by the said defendant, and are manifest on the record of this cause and assigned as follows, to wit:

First. The court erred in overruling the defendant's motion in arrest of judgment.

Second. The court erred in permitting one Walter McCabe to testify in the trial of the said cause over the objection of the defendant. That when the defendant by council objected to the introduction of the testimony of the said Walter McCabe and the admission of said witness to testify for the reasons stated in the bill of exceptions, the court on the trial of the said cause over'uled the said objection, which action of the court is here assigned as manifest and reversible error.

Third. The court erred in overruling the defendant's motion for a new trial, filed in the said court on the 24th day of December, A. D. 1894.

To all and each of which said rulings of the said court on the trial of the said cause, the defendant by council excepted, and asks that
15 the said cause be re-examined and reversed by the Supreme Court for the errors herein assigned.

Respectfully submitted.

FRANK LEE,
M. W. JOHNSON,
Attys. for Deft.

(Endorsed:) No. 662. The United States vs. George L. Wheeler Assignment of error. Filed March 2, 1895. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

In the circuit court of the United States for the eastern district of Texas, holding sessions at Paris, Texas, in said district, November term, A. D. 1894.

THE UNITED STATES)
vs.) No. 662.
GEORGE L. WHEELER.)

Be it remembered that upon the trial of the above styled and numbered cause in the said court, the following proceedings were had:

The said defendant, George L. Wheeler, was indicted by the grand jury of the said court at Paris, Texas, on the 26th day of November, A. D. 1894,

and same was filed in the said court on the said date, which said indictment charged the said defendant, George L. Wheeler, with the crime of murder in words and figures in substance as follows, to wit:

16 "In the name and by the authority of the United States of America:

"In the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit.

"At a stated term of the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit, begun and held at Paris, Texas, within and for the district and circuit aforesaid, on the third Monday, the same being the nin'teenth day of November, in the year of our Lord eighteen hundred and ninety-four, and continued by adjournment to and including the twenty-sixth day of November, in the year of our Lord eighteen hundred and ninety-four.

"Eastern district of Texas, set., the grand jurors of the United States of America, duly elected, impaneled, tried, sworn, and charged to inquire into and due presentment make of offenses against the laws of the United States of America in and for the district and circuit aforesaid, on their oaths in said court present: That one George L. Wheeler, late of the Chickasaw Nation, Tishomingo County, Indian Territory, in the district and circuit aforesaid, on the twelfth day of June, in the year of our Lord eighteen hundred and ninety-four, in Tishomingo County, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit and annexed to and constituting a part of the eastern district of Texas for judicial purposes, and being within the jurisdiction of this court and under the exclusive jurisdiction
17 of the United States, did unlawfully, fraudulently, and feloniously, and with his malice aforethought, and with a certain deadly weapon, to wit, a certain gun then and there held, make an assault in and upon the body of one Robert McCabe with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said George L. Wheeler did then and there shoot off and discharge the contents of said gun at, in, and upon the body of said Robert McCabe, inflicting thereon a mortal wound, of which mortal wound the said Robert McCabe did languish, and languishing did then and there instantly die.

"And the said grand jurors aforesaid, upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, used as aforesaid, and in the manner aforesaid, the said George L. Wheeler did unlawfully, feloniously, and with his malice aforethought, kill and murder the said Robert McCabe. The said Robert McCabe and the said George L. Wheeler being then and there white persons and not Indians nor citizens of the Indian Territory, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

"T. A. McNEILL,
"*Foreman of the Grand Jury.*
"S. TALIAFERRO,
"*Asst. U. S. Attorney, Eastern District of Texas.*

"(Endorsed:) No. 662. The United States vs. Geo. L.
18 Wheeler. Offense: Murder. A true bill. T. A. McNeill, foreman of the grand jury. U. S. witnesses:
"Sallie McCabe, Waxahatchie, I. Ty.
"Walter McCabe, "
"S. M. Myrick, Tishomingo, I. Ty.
"J. C. Shelton, "
"D. E. Booker, Ardmore, "
"John Couch, Tishomingo, "
"Dan Taylor, "
"Old man Craddock, near Wynnewood.
"Returned and filed in open court 26th day of November, 1894. C. Dart, clerk, by H. H. Kirkpatrick, deputy.
"(Further endorsed:) U. S. witnesses, continued:
"Henry Walden, Tishomingo, I. T.
"Zeke Crisp, Reagan, Choctaw Nation.
"John Taylor, Tishomingo."

On the 22nd day of December, A. D. 1894, after being duly and legally arraigned upon the said bill of indictment and a hearing of the said cause had before the said court on the same, a verdict of guilty was rendered against the said defendant, George L. Wheeler, by the jury empaneled to try the said cause, and a proper judgment and entry made thereon in the dockets of the said court. On the said 22nd day of December, A. D. 1894, the said defendant, by attorney, filed in the said court his motion in arrest of judgment in said cause, setting out grounds therefor as follows:

First. Because the indictment alleges that the said defendant, George L. Wheeler, and Robert McCabe, the party alleged to have been killed,
19 "were both white persons and not Indians nor citizens of the Indian Territory." When the same should allege that the said Wheeler and the said McCabe were white persons, and not Indians nor citizens of any Indian tribe or nation.

Second. Because the said bill of indictment nowhere alleges or sets out the fact to be that the said Robert McCabe, the party alleged to have been killed, died of the mortal wounds inflicted by the said defendant.

Which said motion was on the 1 day of January, A. D. 1894, overruled by the said court on a day of the term at which said trial was had, and the court proceeded to sentence the said defendant to death, to which action of the said court overruling the said motion and the sentencing the said defendant aforesaid, the defendant in open court excepted.

Also appeared one Walter McCabe as a witness for the Government upon the trial of the above styled cause. Mrs. Sallie McCabe, the mother of the said witness, had, prior to the introduction of the said Walter McCabe as a witness, testified before said court and on the trial of the said cause as follows:

Q. Now, was your husband walking or riding?
A. He was walking.
Q. Was any one with him?
A. Yes, sir; my little boy.
Q. What is his name?
A. Walter.

Q. How old is he?
20 A. He is going on 6 years old. He was hardly five then.
Q. He is here?
A. Yes, sir.
Q. He was along with your husband?
A. Yes, sir.
Q. Now, when did you first learn of your husband's death? How long was it after the shooting that you heard before you knew of your husband's death?
A. It was not but just a few minutes.
Q. Who notified you?
A. My little boy.
Q. Did he come home without your husband?
A. Yes, sir.
Q. What did you do then?
A. I started to him as quick as he told me.

Cross-examination:

Q. How old did you say your boy was?
A. He was not quite five years old when his father was killed.
Q. That was what day of the month?
A. The 12th day of June. He was five the 5th day of July.

That the said Walter McCabe mentioned in the testimony of Mrs. McCabe was the witness by the same name who was offered by the
21 Government as a witness in this cause, as above set out. When said witness was offered by the Government the defendant objected to his examination until his competency should be shown. Whereupon, the counsel for the Government proceeded to interrogate him upon his voir dire, when he testified as follows:

Q. What is your name?
A. Walter McCabe.
Q. Do you know how old you are?
A. Yes, sir; I am going on 6 years old.
Q. Do you know what they would do to you if you were to tell a story?
A. Yes, sir; the bad man would get me.
Q. What would they do to you here in court?
A. Put me in jail.
Q. That is if you was to tell a lie?
A. Yes, sir.
Q. Where do you live?
A. We live out 3 miles from town, over in that town, we was living in *in* the Nation. Close to that town named Mill Creek.
Q. Do you know what town this is?
A. Yes, sir.
Q. What town is it?
A. This is Arkansas Creek.
Q. Do you know what they call this town?
A. No, sir.
Q. Now, you say you live over in the Territory?
A. Yes, sir.
22 Q. Where did you come from when you come here?
A. We come from the Territory.

Q. What is your mother's name?
A. Sallie McCabe and Bob McCabe.
Q. Who is Bob McCabe?
A. He is Bob McCabe, you know.
Q. Was he any kin to you?
A. Yes, sir.
Q. What kin?
A. He is my papa, you know.
Q. Did you ever go to school?
A. No, sir.
Q. Have you not gone to school?
A. No, sir.
Q. You know the difference between the truth and a lie?
A. Yes, sir; if you told the truth the bad man would get you.
Q. What do you want to tell, the truth or a lie?
A. I am going to teli the truth.
Q. If you tell a lie what would they do with you?
A. Bad man would get you.
Q. What did you say they would do with you here at court?
A. Put you in jail.
Q. If you told a lie?
A. Yes, sir.
Q. Now, do you know what State this is, Bobby?
A. No, sir.
23 Q. You know who would get you if you told the truth?
A. The bad man would get you and put you in jail.
Q. Would they put you in jail for telling the truth?
A. Yes, sir.
Q. What would they do with you if you told a story?
A. The bad man would get you.
Q. Who told you that?
A. My mamma.
Q. When did she tell you?
A. This morning.
Q. What else did she tell you this morning?
A. She says, Don't tell no lie.
Q. Do you know, Bobby, what the clerk said to you when you held up your hand?
A. Yes, sir; he said, Don't you tell no story.

Whereupon the defendant, by his council, objected to the said witness being permitted to testify, becau e the said witness was not competent to so testify, and did not possess sufficient intelligence to relate transactions with respect to which he was interrogated, and did not understand the obligation of an oath, and was too young to be convicted of perjury, no matter what statement he might have made. Which objection the court overruled; whereupon the defendant, by his attorney, excepted. The said Walter McCabe then testified as follows, to wit:

24 Q. Where is Bob McCabe, your father?
A. He is dead.
Q. How come him to be dead?
A. A man over here by the name of Wheeler killed nim, you know.

Q. How do you know Mr. Wheeler killed him?
A. Because I seen him.
Q. Where was Mr. Wheeler at when he killed him?
A. He was after the cows, and he told me to wait until he go after the yearlings, you know.
Q. Was your papa walking or riding?
A. Both of us was walking.
Q. You and your papa?
Yes, sir.
Q. Was you along with your papa?
A. Yes, sir.
Q. You know where the man is that killed your papa?
A. Yes, sir; that man over there. He is in here somewhere.
Q. Look around and see if you can see the man.
[Witness after looking around identifies the defendant.]
Q. Is he the man?
A. Yes, sir.
Q. You say he was behind the tree.
A. Yes, sir.
Q. How did he kill your papa?
A. He had a big old gun, Winchester gun, that had 2 barrels in it.
Q. How many times did he shoot your papa?
25 A. 2 times. He shot him once and then he went close to him and shot him again.
Q. Did your papa fall when he shot him the first time?
A. Yes, sir.
Q. He walked up close to him then, you say, and shot him?
A. Yes, sir.
Q. Where did he shoot your papa at?
A. In the eye and in the body.
Q. Put your hand on your face where he shot him.
A. Once in the eye and once in the body.
Q. How far were you off from him; were you close to him at the time he shot him?
A. I was way down the big road; I looked back; he was dead.
Q. When you saw him shot, how close were you to him then?
A. I was way down the road, you know; I was close to him.
Q. Did you show anybody where you was?
A. Yes, sir.
Q. Did you show anyone here, some of these men that come there, did you show them the next day?
A. No, sir; I never showed them.
Q. Were you walking down there?
A. Yes, sir.
Q. Now, what did you do after he shot your papa?
A. I run to the house and told mamma.
Q. Did Mr. Wheeler have anything along with him?
A. Yes, sir; he had a gun, you know.
26 Q. Anything besides a gun? Have any game of any kind?
A. No, sir; he never had nothing but his gun.
Q. What was your papa doing when he was walking along there?

A. He was going after the cows, you know.
Q. Did your papa have anything in his hand?
A. He had a knife, you know.
Q. What was he doing?
A. He was cutting a stick, you know.
Q. Whittling?
A. Yes, sir.
Q. Whittling along with his knife?
A. Yes, sir.
Q. What become of his knife when this man shot him? Did the knife fall down?
A. Yes, sir.
Q. What become of Mr. Wheeler?
A. He run on to his house.
Q. Did you see him?
A. Yes, sir.
Q. How far was it from Wheeler's house; could you see down to his house?
A. Yes, sir.
Q. From where he killed your papa?
A. Yes, sir; he was right close to his house, you know.
Q. You and your papa was getting the cows up?
A. Yes, sir.
27 Q. You was driving the cows up and your papa went after the yearlings?
A. Yes, sir.
Q. Anybody along besides you and your papa?
A. No, sir.
Q. Mr. Rob McCabe was your father?
A. Yes, sir.
Q. Now, you say Mr. Wheeler was by the tree when you first saw him?
A. Yes, sir; behind the tree.
Q. Was he there when he fired the first shot?
A. Yes, sir.
Q. Where was he at when he fired the second shot?
A. He was way out here first, then he was right close to him when he fired the next shot.
Q. When he shot him the last time?
A. Yes, sir.
Q. Then he left and went home?
A. Yes, sir.

Cross-examination:

Q. Was you at home when your papa started?
A. No, sir; I was going with him, you know.
Q. When you started from your home after the cows?
A. Yes, sir, I was with him.
Q. You went with your papa?
A. Yes, sir.
Q. Did you see Mr. Wheeler before you started?
28 A. Yes, sir.
Q. You saw him?

A. Yes, sir.
Q. Where had he gone?
A. He was going on down to kill papa.
Q. I mean when you first started from your home.
A. We was going on after the cows.
Q. Had you seen Mr. Wheeler pass your house?
A. Yes, sir.
Q. How long after Mr. Wheeler passed your house was it before you and your papa went out and went on after him?
A. About 2 minutes.
Q. Could you see Mr. Wheeler when you went down after him?
A. Yes, sir; we saw him, you know.
Q. Then you went on after the cows?
A. Yes, sir.
Q. How far was the cows?
A. I guess they was about a yard, you know.
Q. Did the cows come up every night?
A. Yes, sir; come up some nights, not every night.
Q. About what time, now, would the cows come up?
A. About dark.
Q. Why did you not wait for the cows to come up this night?
A. We waited a long time, and eat dinner, and he would not come up, and we had to go after them.
29 Q. It was not dark?
A. Sort of dark, not much.
Q. Did you run when you saw Wheeler?
A. No, sir; we went on until he killed papa.
Q. Then did you run?
A. Yes, sir; I run then and told mamma.
Q. Did you run before Mr. Wheeler shot?
A. No, sir; we never run.
Q. Did you run?
A. No, sir; I never run either.
Q. Was your papa in the middle of the road when he was shot?
A. No, sir; he was out by the road.
Q. What did he go out away from the road for?
A. He went out after the yearlings.
Q. Did you not see Mr. Wheeler before he went out?
A. Yes, sir; I saw him.
Q. Then your papa saw him, did he not?
A. No, sir; he never saw him.
Q. Why could not your papa see him, your papa was going the road towards him?
A. Yes, sir.
Q. Going the road where Wheeler was?
A. Yes, sir.
Q. Could he not see him then?
A. No, sir; he could not see him.
30 Q. Was you with your papa?
A. Yes, sir.
Q. Did your papa have the big blade of the knife open?

A. No, sir; he had the little blade.
Q. You are sure it was the little blade that he was whittling with?
A. Yes, sir.
Q. Did you not see a dead squirrel that somebody killed?
A. No, sir.
Q. What did your mother tell you this morning to say?
A. She says, Don't tell no lie.
Q. Did she tell you to tell the jury that she told you not to tell no lie?
A. Yes, sir.
Q. What else did she tell you to say?
A. She never told me nothing else.
Q. Did anybody tell you about the case when you went before Mr. Gibbons before in the Territory?
A. No, sir.
Q. Did anybody tell you to say nobody talked to you?
A. No, sir, he never; he told me not to tell no story.
Q. Did she tell you to tell the commissioner that she told you that.
A. Yes, sir.
Q. Has she ever talked to you about the case at all?
A. Yes, sir.
Q. Ever told you what to say?
A. Yes, sir.
31 Q. When did she tell you what to say?
A. She told me this morning, you know.
Q. She has talked to you when you was at home about this?
A. Yes, sir.
Q. Did she tell you how to tell it to the jury?
A. Yes, sir.
Q. Told you what to say?
A. Yes, sir.
Q. Told you to tell the jury where Mr. Wheeler stood and where your papa stood?
A. Yes, sir.
Q. Told you to tell the jury that Mr. McCabe, your father, was whittling?
A. Yes, sir.
Q. Was that all she told you to say?
A. Yes, sir.
Q. You remember when you was before the commissioner in the I. T.
A. Yes, sir.
Q. At Ardmore?
A. Yes, sir.
Q. You did not tell the commissioner that he went up closer and shot, did you?
A. No, sir.
Q. Since that time has anybody told you to say that?
A. No, sir; nobody never told me.
Q. You just never thought of it then?
32 A. I never thought of it, you know.
Q. You have thought of that since?
A. Yes, sir; I told it then; then mother told me about it.

Q. Is that the way you happened to think of it?
A. Yes, sir.
Q. Was that after you went back from Ardmore?
A. Yes, sir.
Q. After you went back from Ardmore, what did your mother say?
A. She says, Don't tell no story.
Q. What else did she say?
A. She never said nothing else.
Q. Did she not tell you about him going closer?
A. Yes, sir.
Q. She said that, then, did she?
A. Yes, sir.
Q. Was that all she said?
A. Yes, sir.
Q. Told about whittling and coming from behind the tree?
A. Yes, sir.
Q. She told you about the whittling?
A. She told me he whittled some, you know.
Q. Your papa was mad at Mr. Wheeler?
A. Yes, sir.
Q. Did he say he was going to kill him?
A. No, sir.
Q. Did you ever hear your papa say that?
A. No, sir.
33 Q. What did he say?
A. He never said nothing else.
Q. What did he say he was going to do to Mr. Wheeler?
A. He never said he was going to do nothing to him.
Q. How do you know that your papa was mad at Mr. Wheeler?
A. Because I know; because he said he was mad at him.
Q. Is that all he said?
A. Yes, sir.
Q. Did he say anything else except that he was mad at him?
A. No, sir.
Q. Did not say he was going to kill him, or anything like that?
A. No, sir.
Q. Do you remember of your papa going down to Wheeler's house a little while before that?
A. No, sir; he never went down there.
Q. Did you not go down with him one time?
A. Yes, sir; I went once with him.
Q. Did you find Mr. and Mrs. Wheeler there?
A. Yes, sir.
Q. Was your papa there?
A. Yes, sir.
Q. What did he say to them?
A. He never said nothing then to him.
Q. Did you go with your papa to the field where Mr. and Mrs. Wheeler were at work?
A. Yes, sir.
34 Q. What did he say to them then?

A. He never said nothing then.
Q. Did he curse them?
A. No, sir.
Q. You sure?
A. Yes, sir.
Q. He went to the field, but he never said nothing?
A. No, sir.
Q. What did he go for?
A. He just went down there, you know, to be down there.
Q. What did he go for?
A. He never went for nothing.
Q. How far did he go to get there?
A. He never went but just a little bit of a piece. It was between our house, you know.
Q. Anybody tell you not to say what your papa done down there?
A. No, sir.
Q. Did you show anybody the place behind the tree where Mr. Wheeler stood?
A. No, sir.
Q. Was your papa behind the tree?
A. No, sir; we went after the cows, you know, and after the calves. He told me to drive the cows home.
Q. When your papa left the road and left you to drive the cows and went towards Mr. Wheeler, what did he say?
A. He told me to drive the cows on.
35 Q. He left the road?
A. Yes, sir.
Q. What did he say when he left the road?
A. He never said nothing.
Q. He was going right towards Mr. Wheeler, was he not?
A. No, sir; he went out from Mr. Wheeler.
Q. Was he not going towards Mr. Wheeler; was he not going where Mr. Wheeler was?
A. No, sir; he was not going where he was; he was just going towards home.
Q. What did he say when he started towards him?
A. He never said nothing; he just went after the cows.
Q. Which hand did he have his knife in?
A. He had it in his right hand.
Q. Had the little blade open?
A. Yes, sir.
Q. Did he put the knife in his pocket before he left home?
A. Yes, sir.
Q. Did you see him puf it in his pocket?
A. Yes, sir.
Q. You saw him put it in his pocket when he left home?
A. Yes, sir.
Q. What did he say when he put it in his pocket?
A. He never said nothing; both of them never said nothing.

Redirect:

Q. You say that he got his knife out after he started and com-
36 menced whittling on a stick?

A. Yes, sir.

Q. He never spoke to Wheeler before he shot him?

A. No, sir; he never spoke to him at all.

Q. All you know your mamma has always told you just to tell the truth; tell what you saw and what you knew about this case?

A. Yes, sir.

Q. That is what she told you to tell, the truth.

A. Yes, sir; she told me to tell what you know you know.

To all of which testimony the defendant by attorney excepted in open court.

Also came the defendant, GEORGE L. WHEELER, on the trial of the said cause, and on his own behalf testified as follows, to wit:

Q. You are the defendant in this case?

A. Yes, sir.

Q. How long had you known Mr. McCabe, the man you are charged with killing?

A. I guess I had known him about 8 or 10 months.

Q. How far did you and McCabe live apart?

A. About 200 yards.

Q. How long had you lived that close together?

A. We had not lived that close together more than 6 months.

Q. How far were you living apart when this difficulty come up down in the field where he cursed you and your wife?

37 A. About 200 yards apart.

Q. That was after you had moved up there close together?

A. Yes, sir.

Q. Now, what were you and your wife doing when McCabe come to your field?

A. I was plowing and she was sowing cotton seed.

Q. Did Mr. McCabe come to the field where you were at work?

A. Yes, sir.

Q. If you can remember, just tell that jury what it was he said to you and your wife there on that occasion.

A. The start of it was about Winkley's cow. He wanted me to milk the cow. I first told him that I did not want to milk her. He had been after me for 2 or 3 days. I told him no, it would raise hard feelings. We went down to the field to work and McCabe come over there. She told McCabe—asked him if he had seen Winkley. He says, Yes, sir; I have seen both of them.

Q. Was that your wife talking to him?

A. Yes, sir.

Q. Well, go on.

A. She says, What did they say about this cow? He says, They did not say anything about the cow. Says he, You are always meddling where you have got no damned business anyway. I had not said a word until then. I spoke up and says, Bob if there is any meddling done at all I done it. I told Winkley about this cow. He says, Well, you are

meddling about where you have got no business then. I expect to milk this cow until Winkley comes after her. I told him it did not make much difference to me, but then Winkley told me to milk her.
38 He said if I milked her I would take a skinned head. I did not want to fight him. It went on several words; I don't know all the words that was passed. He called me a liar and called me a son of a bitch.

Q. Where was he when he said that?

A. He was on the outside of the fence when he spoke them words.

Q. What was he doing when he said it?

A. He was reaching after a stick, I think, when he spoke them; if he did not, it was just after he picked up the stick. I turned from my plow and told him I did not want to fight; did not want any trouble with him. I went on plowing and left him with my wife. He stayed there and cursed until I got pretty near around; just before I got back to where he was he left.

Q. How long was that before you had the difficulty in which you killed him?

A. It was about a month, I guess.

Q. Now, do you remember just what he said to your wife there after he said this to her about meddling where she had no business?

A. I don't know whether I remember exactly the words he spoke or not.

Q. Did he say any curse words to her or not?

A. I could not say just what he said to her.

Q. Now, after this talk down there in the field to you and your wife, did you see him often after that?

A. Yes, sir; I would see him every few days.

Q. You and he had no further trouble about it until this fatal difficulty?

A. No, sir.

39 Q. Where had you been the day of this difficulty—the last difficulty, in which you killed him?

A. In the morning I went to Tishimingo.

Q. How far was that from where you lived?

A. About 2 or 2½ miles.

Q. What time did you get over there, and what time did you get back?

A. I guess it was about 10 or 11 o'clock when I got there. I left for home tolerably early. I killed the squirrel on the road. I guess it was about one o'clock when I got home.

Q. Did you buy anything over at Tishimingo?

A. Yes, sir; I got some shot.

Q. What kind of shot?

A. Squirrel shot and duck shot, I reckon; they was mixed shot.

Q. What did you do with the squirrels that you killed as you went over to Tishimingo?

A. I sold them and bought shot with them.

Q. When you come back home that day, what did you do?

A. I went to plow after I got my dinner.

Q. How late did you plow?

A. Until pretty near sundown.

Q. When you quit plowing, where did you go?

A. I went out on the other side of my house to see about a pony I had hobbled out, and I taken my gun along to kill a squirrel.

Q. What was it loaded with?

A. It was loaded with squirrel shot.

Q. Did you kill a squirrel on that trip, or not?

A. Yes, sir.

40 Q. Did you go out and see about your pony?

A. Yes, sir.

Q. Had you been to your pony and was returning, or was you going to your pony when this difficulty come up?

A. I had been to the pony and was coming back.

Q. How many times did you shoot at the squirrel?

A. I shot once, and loaded the gun up and went on.

Q. After shooting the squirrel once, did you reload that barrel of the gun?

A. Yes, sir.

Q. What were you doing when this difficulty came up between you and Mr. McCabe? Tell that jury how it come up and all about it.

A. I was coming on back with the gun on my shoulder and a squirrel in my hand. McCabe he was in the road. I reckon he was in the road. He was coming from towards the road running right on to me with his knife in his hand; I backed a piece from him, trying to get him to stop; he would not do it, and I shot him—shot twice as quick as I could.

Q. How far do you think you backed from him when he run on to you with the knife?

A. I think I backed 10 or may be 12 steps.

Q. What did you do with the squirrel in the meantime?

A. I dropped the squirrel.

Q. Was anybody with him that you saw about there?

A. I did not see anybody until after I shot him.

Q. Who did you see then?

41 A. I saw this little boy here, Walter.

Q. Where was he?

A. He was going towards his house.

Q. In the road or out of the road?

A. In the old road when I first saw him.

Q. You stated that you were coming back with the squirrel in one hand and your gun on your shoulder, and he attacked you with his knife; how near did he get to you with the knife before you noticed him?

A. I don't think he was more than 6 feet from me when I first shot him.

Q. You say you shot both barrels as quick as you could?

A. Yes, sir.

Q. He was in 5 or 6 feet of you coming right on to you; tell the jury whether or not he said anything when he rushed on to you.

A. Yes, sir; he told me when I first saw him, says he, "you damned son of a bitch, I am going to make my words true," was the remark he made to me the first I noticed of him.

Q. What did he do after making that remark?

A. He kept coming on towards me.

Q. Which hand did he have the knife in?

A. In the right hand, I think it was.

Q. You know whether he was a right-handed or a left-handed man?

A. No, sir; I could not say.

Q. Did you ask him to stop?

42 A. Yes, sir; I asked him to stop 3 or 4 times, any way.

Q. Now, were there any trees near about there where you shot him?

A. Yes, sir; there were trees all around there.

Q. You say that you had not seen him until he got right near to you?

A. No, sir.

Q. You don't know where he had been up to that time?

A. No, sir.

Q. Now, you heard that little boy testify this morning about you coming out from behind a tree. Were you there behind any tree, and had you seen this man before he came up to you?

A. No, sir, I was not.

Q. There was trees there; it was in the woods?

A. Yes, sir.

Q. Trees all about there?

A. Yes, sir.

Q. Now, about how far was the road that run along there from where McCabe assaulted you with that knife?

A. Well, I guess it was about 10 or 15 steps; I never did step it; never saw anybody else step it.

Q. Then, if the little boy and his father was in that road that little boy was speaking of this morning, that runs along there, he had left the road then and come 10 or 15 steps out towards you?

A. Yes, sir.

Q. You think it was that far from the road where you had the difficulty?

A. Yes, sir.

43 Q. Then it is not a fact that after you shot him once that you went up closer to him and shot him again?

A. No, sir; I shot him the first time; I reckon I stepped back—I was going backwards; I am satisfied I made a step or two before I shot him the second time; instead of going towards him I was going backwards.

Q. You don't know where you hit him?

A. No, sir; I shot him twice, as quick as I could, when I did shoot.

Q. Who was it found this note dropped in your yard there?

A. My wife found that note.

Q. Were you at home the night that was dropped in the yard?

A. Yes, sir.

Q. You remember the time?

A. Yes, sir.

Q. Did anybody ever communicate to you any threats that Mr. McCabe had made against you?

A. Yes, sir; Mr. Jarmen; he told me I had better watch out.

Q. He is the man that testified here this evening?

A. Yes, sir.

Q. Tell that jury, as well as you can remember, what it was he said to you about watching your corners.

A. He did not say anything much to me more than told me that I had better be on the lookout; he would not tell me what was the reason.

Q. Did anybody else tell you anything about it?
A. No, sir.
Q. From Mr. Jarmen's conversation to you, did you understand
44 who he was talking of?
A. Well, I had an idea; McCabe and I were at outs and he was the only man.
Q. You had not had any difficulty with any other man?
A. No, sir; me and no other man was not mad at each other that I knew of.
Q. You lived right there, you say, within 200 yards of him?
A. Yes, sir.
Q. If you had wanted to kill him for what he said to you and your wife you had plenty of opportunities before this?
A. Yes, sir.
Q. Had seen him often, I believe you stated.
A. Yes, sir.

Cross-examination:

Q. This note was found there in the yard about two weeks before you killed McCabe?
A. Well, sir, it was, I think, 3 weeks.
Q. You passed by McCabe's house about a half an hour by sun?
A. No, sir.
Q. Did not go from Tishimingo down there?
A. No, sir.
Q. You passed by the house when you went from Tishimingo?
A. Yes, sir; but it was about 1 o'clock.
Q. You did not kill him about cursing you and your wife, did you?
A. No, sir.
Q. Killed him about the hogs, though, did you not?
A. No, sir.
45 Q. McCabe was a witness against you for stealing hogs from Taylor?
A. Not that I knew of.
Q. Did you not tell Micheal and other parties about him accusing you of it, and saying he found you with some of Taylor's hogs? Did you not know that he was going to be a witness against you in the Ardmore court for the theft of these hogs?
A. No, sir.
Q. You did not make any such statement to this merchant there?
A. No, sir.
Q. You say you bought a lot of these mixed shot?
A. Yes, sir.
Q. Same kind of shot you killed McCabe with?
A. Yes, sir; I think the same kind of shot. It was not the same shot, but then the same kind.
Q. Where was your wife at when you killed McCabe?
A. In the cow lot.
Q. You were not in the cow lot?
A. No, sir.
Q. You are certain you are the man that shot him?
A. I think I was.

Q. You got any doubt about it?

A. No, sir.

Q. When you went that night to tell some of them about coming there you went to see Wyrick and Denham?

A. Yes, sir.

Q. You told them that you did not know who it was that killed him?

A. No, sir.

46 Q. You told Andy Potts that you did not know who it was that killed him?

A. No, sir.

Q. You told Joe Potts that you did not know who it was that killed him?

A. No, sir.

Q. Did you tell Mr. Walden that?

A. No, sir.

Q. Did you tell everybody that went up there that night that you did not know who done the killing; that you thought it would be laid on you because it was so close to your house?

A. No, sir.

Q. Never have denied the killing of McCabe?

A. No, sir.

Q. Never denied it?

A. No, sir.

Q. Did you not say you did not kill him; that you was in the cow pen milking with your wife at the time of the killing, but that the killing was close to your house and you expected it would be laid on to you?

A. No, sir.

Q. Never stated that to anyone?

A. No, sir.

Q. You went to the body after Mrs. McCabe come down there and asked her not to be taking on so?

A. Yes, sir; I told her not to take on so, that it was done.

47 Q. You did not tell her that you had murdered her husband?

A. No, sir.

Q. You saw this little boy, you say, going to the house?

A. Yes, sir.

Q. You heard her screaming and hallooing after that little boy went to the house?

A. Yes, sir.

Q. Your wife went there?

A. Yes, sir.

Q. When you went to the lot did you say anything to your wife about killing him?

A. No, sir.

Q. Did not mention it to her?

A. No, sir; I don't think I made any mention of it.

Q. Is it not a fact that when you went back from Tishimingo that you went by McCabe's house about an hour by sun, and you went there in the woods and killed squirrels, and you stayed there until McCabe went after his cows and you got behind a tree and shot him when he was not looking at you?

A. No, sir.

Q. You know Booker, the deputy marshal that brought you down here?

A. Yes, sir.

Q. Did you not ask him if he thought it best to deny this or claim self-defense?

A. No, sir.

Q. Ask him if he thought this boy's evidence would be taken
48 in court?

A. No, sir.

Q. You know the man I am asking you about?

A. Yes, sir.

Q. You did not tell him, did not ask his advice about whether you were to claim that you did not do the shooting, knew nothing about it, or set up the claim of self-defense?

A. No, sir.

Q. Asked him if he thought this little boy Walter's testimony would be taken in court?

A. Yes, sir; I asked him what he thought about a child of that age, his oath being taken in court.

Q. You did not state that night to any one of the parties that were there, Denham or any of these parties that are here, that you was in the lot and did not know who done the killing, that you did not do it, that you were innocent?

A. No, sir.

Q. McCabe was in his shirt sleeves, was he not?

A. Yes, sir; I think so.

Q. You could see from your house up there?

A. Yes, sir.

Q. Did you not see McCabe and his little boy when they left their house just about sundown, going down there after the cows; did you not then get your gun and go and secrete yourself behind this tree, and when he come along shoot him without speaking a word to him?

A. No, sir; I never.

49 Q. Was there ever a word passed between you and him at the time you shot him?

A. Yes, sir.

Q. What was it that was said?

A. The first words, and about all the words I remember, he says, "You damned son of a bitch, I am going to make my words true," and he was coming on to me with his knife.

Q. How far was he from you?

A. 10 steps, I guess.

Q. What did you do then?

A. I spoke to him and told him not to do that.

Q. Do what?

A. Not to run on to me—he was coming right at me with his knife.

Q. He could see you with your gun?

A. Yes, sir.

Q. He was looking towards you?

A. Yes, sir.

Q. Did you have the squirrel at that time?

A. Yes, sir.

Q. Now, what become of that squirrel?

A. Well, sir, I can not tell you; I dropped that squirrel somewhere.

Q. When was that, before or after you killed him?

A. I guess it was before I killed him I dropped it.

Q. Did you not throw the squirrel down when you first saw him and get behind that tree, put yourself in the direction of where he was coming and leave the squirrel there afterwards?

50 A. No, sir.

Q. Which way did you go when you left there after you killed him?

A. I went right straight back to my house.

Q. Did you see Walden and them men tracking you in there the next morning?

A. No, sir; I did not see them track me; I saw some men out there where he was killed; then I saw Taylor and old man Craddock sit down on the side of the road before they arrested me.

Q. Was not McCabe whittling before you shot him?

A. No, sir; if he was I never saw anything of it.

Q. Did you not state to Mr. Shelton, a witness in this case, on the next day after the killing when they were tracking there that you were in the cow lot at the time the shooting occurred, that you did not do it, that you were innocent of it, that you would stand your trial for it if it broke your neck?

A. No, sir.

Q. Did you not deny knowing anything about it to Andy Potts, Joe Potts, Denham, Dan Taylor, Walden, and Wyrick, all these parties that were there; in the presence of them that night and the next day, did you not deny it and say that you were in the lot with your wife milking at the time the shots were fired and that you did not do the shooting?

A. No, sir.

Q. That night or the next day or any time?

A. No, sir.

Q. Do you know anything about who wrote that note?

51 A. No, sir; I could not swear who wrote that note.

Q. Which gun was it that you shot McCabe with?

A. With the breech-loading shotgun.

Q. You had a breech-loading there and you had a muzzle-loading there?

A. Yes, sir.

Q. Did you have that breech-loading gun loaded?

A. Yes, sir.

Q. Was it loaded when they got the gun?

A. No, sir.

Q. It was not the gun you had been hunting squirrels with that day?

A. No, sir.

Q. How was it that you come to take this gun? You had been killing squirrels with the muzzle-loading gun the first part of the day; how come you to use the breech-loading that evening?

A. Because it come the handiest to pick it up.

Q. The muzzle-loading gun was loaded; that was the gun that belonged to you—the muzzle-loading?

A. Yes, sir.
Q. Who did the other one belong to?
A. To a man by the name of Burns.
Q. Where was he?
A. He said he had gone to Denison.
Q. Nobody at your house but you and your wife and your little baby girl?

A. That is all.

52 Redirect:

Q. You say that in coming down here with Mr. Booker, you asked him about this child's testimony, whether he thought it would be admitted?
A. Yes, sir.
Q. Was that after the examining trial at Ardmore?
A. Yes, sir.
Q. Had you heard this child testify at Ardmore?
A. Yes, sir.
Q. Was the statement that the child made there at Ardmore true or false?
A. It was false.
Q. You heard him make that statement at Ardmore and it was false, and you wanted to know if he could make that same false statement in court?
A. Yes, sir.
Q. Do you know Mr. Wyrick?
A. Yes, sir.
Q. Did you state to him that night anything about seeing that boy there at the killing and not having anything to do with the killing yourself?
A. No, sir.
Q. Did you state in his presence to anybody that you wanted a gun that would not snap, because a hog thief wanted a gun that would not snap, or something to that effect?

A. No, sir.

53 Q. You never said anything like that to him or in his hearing.
A. No, sir.

Q. Mr. Hanney asked you if you denied having anything to do with this killing to these parties he mentioned. What did you say to them?
A. All I said to them, I wanted them to go over there; I asked them to go and help me to take him in; they asked me what was the matter; I told them a man had been found dead, and I wanted them to help me take him home.
Q. You did not deny having killed him or acknowledge it?
A. No, sir; I just said Bob McCabe had been found dead there by my house, and I wanted to take him home.

And be it further remembered that upon the trial of the said cause, and after the verdict of the jury convicting the defendant had been rendered therein, came the defendant on the 24 day of December, A. D. 1894, by his attorneys, and filed in the said court his motion for a new trial, the same being as follows:

In the circuit court of the United States for the eastern district of Texas, holding sessions at Paris, Texas, in said district. November term, A. D. 1894.

THE UNITED STATES,)
vs.) No. 662.
GEORGE L. WHEELER.)

Now comes the defendant, George L. Wheeler, in the above styled and numbered cause, and asks the court to grant him a new trial in the said cause and for the following reasons, to wit:

54 First. Because the verdict of the jury is contrary to the law and evidence.

Second. Because the court erred in his charge to the jury on the law of self-defense in this, to wit, that he failed to charge that the defendant had the right to act upon the appearance of danger, and that if it reasonably appeared to him that he was in danger of life or serious bodily harm he had the right to avert the threatened danger by taking the life of his adversary, whether the said danger was real or not.

Third. Because the court erred in excluding from the jury and refusing to admit the testimony of John Wheeler when offered by the defendant.

Fourth. Because the court erred in admitting the testimony of Walter McCabe over the objection of the defendant.

Wherefore defendant asks that a new trial be granted for reason of the errors above set out.

Respectfully submitted.

JOHNSON AND LEE,
Attorneys for Deft.

(Endorsed:) No. 662. The United States vs. George L. Wheeler. Motion for a new trial. Filed Dec. 24, 1894. C. Dart, clerk, by Mel Kirkpatrick, deputy.

And upon a hearing of the said motion by the said court on the 1 day of January, A. D. 1894, the same being a day of the term of said court at which said trial was had, the same was on the said day over-

55 ruled by the said court. To which action of the said court overruling the said motion, and to all matters and things herein set out, the defendant in person and by attorney excepted in open court, and now tenders this his bill of exceptions and asks that the same be signed and approved by the court, which is accordingly done.

Approved and allowed and ordered to be filed as a part of the record in this cause.

DAVID E. BRYANT,
Judge presiding at the trial of this cause.

(Endorsed:) The United States vs. George L. Wheeler. Bill of exceptions. Filed March 2, 1895. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

THURSDAY, *February 14th*, 1895.

THE UNITED STATES }
vs. } 662.
GEORGE L. WHEELER. }

In pursuance of requirements occasioned by proceedings pending in higher courts on appeal of this cause and as per statutes in such case made and provided, it is ordered that the execution of the judgment in this cause be postponed until further order of this court.

56 THE UNITED STATES OF AMERICA:

To Hon. S. Taliaferro, United States district attorney for the eastern district of Texas, greeting:

You are hereby cited and admonished to appear at a session of the Supreme Court of the United States to be holden at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, in the fifth circuit, setting at Paris, Texas, wherein George L. Wheeler is plaintiff in error and the United States is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be re-examined and reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States this the 23d day of February, A. D. 1895.

[SEAL.] DAVID E. BRYANT,
United States District Judge in and for the Eastern District of Texas.

Attest:
C. DART, *Clerk*,
By H. H. KIRKPATRICK, *Deputy*.

(Endorsed:) No. 662. The United States vs. George L. Wheeler. Citation in error. Filed Mar. 2, 1895. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

(Further endorsed:) I hereby accept service of this citation, waiving copy, this February 23, 1895. S. Taliaferro, asst. U. S. atty.

57 I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, hereby certify that the above and foregoing 56 pages of transcript contain a true copy of the record, and of the assignment of errors, and of all proceedings in cause No. 662 on the criminal dockets of said court at Paris, Texas, and entitled The United States (defendant in error) against George L. Wheeler (plaintiff in error), as the same appear of record and on file in my office at Paris, Texas.

Witness my hand and the seal of said court at Paris, Texas, this 22ond day of March, A. D. 1895.

[SEAL.] C. DART, *Clerk*,
By H. H. KIRKPATRICK, *Deputy*.

58 UNITED STATES OF AMERICA, ss.

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The United States, plaintiff, and George L. Wheeler, defendant, a manifest error hath happened, to the great damage of the said George L. Wheeler, defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., within 30 days from the date hereof, in the said Supreme Court to be then and there held, and the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 23 day of February, in the year of our Lord one thousand eight hundred and ninety-five.

[SEAL.] C. DART,
Clerk of the Circuit Court of the United States for the Eastern District of Texas,
By H. H. KIRKPATRICK, *Deputy.*

Allowed February 23, 1895, by
DAVID E. BRYANT,
District Judge, E. D. Tex.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, hereby certify that I received this writ on the 2ond day of March, 1895, and that on this 22ond day of March, 1895, I have transmitted to the clerk of the United States Supreme Court at Washington, D. C., a true copy of the record and proceedings in the within-named cause, duly certified under my hand and seal.

Witness my hand and the seal of said court at my office in the city of Paris, Texas, the day and date last above named.

[SEAL.] C. DART, *Clerk,*
By H. H. KIRKPATRICK, *Deputy.*

(Indorsed:) No. 662. Criminal docket. United States circuit court, eastern district of Texas, at Paris. The United States vs. Geo. L. Wheeler. Writ of error. Filed Mar. 2, 1895. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

(Indorsed:) Case No. 15844. Term No. 960. George L. Wheeler, plaintiff in error, vs. The United States. E. Texas. C. C. U. S. Filed March 26th, 1895.

Office Supreme Court U. S.
FILED.
APR 27 1895
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

GEORGE L. WHEELER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

No. [redacted] 571

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

GEORGE L. WHEELER, PLAINTIFF in error,
v.
THE UNITED STATES.
} No. 960.

MOTION TO ADVANCE.

The plaintiff in error was indicted November 19, 1894, in the circuit court of the United States for the eastern district of Texas for having on the 12th day of June, 1894, murdered one Robert McCabe. He was tried, and on December 22, 1894, found guilty as charged in the indictment.

The Solicitor-General respectfully moves the court to advance the case upon the docket and set it down for hearing at such day during the next term as may be convenient to the court.

Notice of this motion has been served on the plaintiff in error, and his counsel in the court below, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

15554

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE L. WHEELER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

No. 571

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE L. WHEELER, PLAINTIFF in error, v. THE UNITED STATES. } No. 571.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR DEFENDANT IN ERROR.

George L. Wheeler, the plaintiff in error, was indicted upon the charge of murdering one Robert McCabe on June 12, 1894, in the Chickasaw Nation in the Indian Territory, McCabe and Wheeler being both white persons and not Indians or citizens of the Indian Territory. He was tried before Judge Bryant and a jury, and convicted December 22, 1894.

STATEMENT OF FACTS.

The evidence is not set forth in full in the bill of exceptions. It was admitted by Wheeler that he shot

McCabe. He claimed to have done so in self-defense. McCabe had no gun, but only a knife. Nobody was with McCabe but his son, a boy under five. It seems to have been shown that Wheeler immediately after the shooting denied his participation in the act. The only important question relates to the admissibility of the testimony of the little boy.

ASSIGNMENTS OF ERROR.

I. It is claimed that the motion in arrest of judgment should have been granted. This motion attacked the indictment on merely technical grounds, and is disposed of by *Westmoreland* v. *United States* (155 U. S., 545).

II. It is claimed that the court erred in admitting Walter McCabe to testify. The exception upon which this assignment is founded is to be found at page 11 of the record, at the close of the preliminary examination of this child upon the question of competency. On page 18, at the close of this testimony, is to be found the statement, "to all of which testimony the defendant, by attorney, excepted in open court." This seems to refer back to the exception at page 11, as there is no motion to strike out. The question is, therefore, whether the preliminary examination of Walter McCabe, at pages 10 to 11 of the record, shows such incompetency on his part as to make the judge's action in admitting his testimony an abuse of discretion.

Walter was within a month of five years old at the time his father was killed, and nearly five and a half years old at the time of the trial. He had never been to

school. He was asked no questions about the obligation of an oath, and was somewhat confused as to the practical results of telling the truth on the stand, as to which he had been drilled by his mother just before testifying. He reported her general instructions as "Don't tell no lie," and condensed the oath administered by the clerk into, "Don't you tell no story."

It seems to be well settled that the question of competency of an infant under fourteen is addressed to the discretion of the trial court, and that the decision of that court admitting or excluding testimony is to be reversed only when this discretion has been clearly abused. The trial judge actually sees the child, and can tell when its mistakes in answering questions arise from lack of intelligence and when they arise from mental confusion induced by fright or bashfulness. If the judge admits the testimony, any mistake in exercise of discretion can be corrected by the jury, who are not apt to convict, especially in case of capital crimes, without clear testimony. The principles upon which such cases are decided have been recently laid down with clearness by the supreme court of Wisconsin in *State* v. *Juneau* (88 Wis., 180). The witness in that case was four years and nine months old at the time the crime was committed, and five years and five months old at the time of the trial. The court say (pp. 182, 183):

> It seems to be the settled law that after four years of age a child is not incompetent to testify as a witness by reason of any rule of law which excludes him. Whether a child above that age is competent to testify depends upon his intelligence, which is to

be determined by the trial court by examination of the child in court. The question is addressed to the discretion of the trial court. Its determination on such examination is final, except in a clear case of the abuse of its discretion. "It may be regarded as well settled that whenever there is intelligence enough to observe and to narrate, there a child (a due sense of the obligation of an oath being shown) can be admitted to testify." (1 Whart. Ev. (3d ed.), § 398.) "Age, at least after four years are past, does not touch competency; and the question is one of intelligence, which, whenever a doubt arises, the court will determine to its own satisfaction by examining the infant on his knowledge of the obligation of an oath and the religious and secular penalties for perjury." (Id., § 399.) "It will require a strong case to sustain a reversal of the ruling of the court examining such a witness." (Id., § 400.) [Citing cases.] Whether the trial court determined rightly the questions of the competency of the witness is not presented here. That is a question of fact. Only questions of law are to be reported, under the statute, or considered by this court. [Citing cases.]

The Juneau Case, although decided as late as 1894, has already been cited with approval by the Maryland court of appeals in *Freeny* v. *Freeny* (31 Atlantic Rep., 304); and that court also holds that the question of capacity is addressed to the discretion of the court, and it is not the subject of appeal. (See also *Commonwealth* v. *Mullins*, 2 Allen, 295; *Ridenhour* v. *Kansas City Cable Railway Company*, 102 Mo., 270, 288, 289; *Peterson* v. *State*, 47 Ga., 524, 527; *State* v. *Edwards*, 79 N. C., 648; *State* v. *Jackson*, 9 Oreg., 457.)

It will be noticed that the child in the Juneau case was of the same age to a month with Walter McCabe. That a child of five might be competent to testify was held by all of the judges of England as long ago as *Brazier's Case* (1 East. P. C., 443, 444), where the judges held that the infant would have been competent to testify "if she were capable of distinguishing between good and evil." To make the rule otherwise would be to proclaim immunity to many offenses. (See *McGuff* v. *The State*, 88 Ala., 147, 150, 151, and cas. cit.)

It is unnecessary to ask an infant concerning the existence of a Supreme Being. (*Grimes* v. *State*, 17 Southern Rep., 184, Ala., 1895; see also *State* v. *Levy*, 23 Minn., 104; *Davidson* v. *State*, 39 Tex., 129; *Blackwell* v. *State*, 11 Ind., 196.)

III. The third assignment of error relates to the defendant's motion for a new trial. The denial of such a motion is not assignable as error. (*Moore* v. *United States*, 150 U. S., 57; *Holder* v. *United States*, 150 U. S., 91); nor, except as to the testimony of Walter McCabe, does the record contain an account of the circumstances alluded to in the motion.

EDWARD B. WHITNEY,
Assistant Attorney General.

159 U.S. 526

4

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~221~~. 31

THE WINONA AND ST. PETER LAND COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED JULY 10, 1891.

(14,732.)

(14,732.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 221.

THE WINONA AND ST. PETER LAND COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 8, 1894.

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1 STATE OF MINNESOTA:

Office of the Clerk of the Supreme Court.

Answer of the Judges of the Supreme Court of the State of Minnesota in the within Writ Mentioned.

To the Supreme Court of the United States:

The judges of the supreme court of the State of Minnesota, by the clerk of that court, hereby certify and return to the annexed writ of error—

That the annexed copy of record contains, comprises, and constitutes a true and complete transcript of the final judgment, judgment-roll, record, and proceedings had in the supreme court of the State of Minnesota in the case between The State of Minnesota, defendant in error, and The Winona & St. Peter Land Company, plaintiff in error, including also copy of the petition for said writ of error and of the bond given in that behalf, and the original citation and proof of service thereof, as the same remain of record and on file in the office of the clerk thereof.

In testimony whereof the clerk of the supreme court of the State of Minnesota has hereunto subscribed his name and has caused the seal of that court to be hereunto duly affixed, at his office, at the capitol, at St. Paul, in the State of Minnesota, on the third day of July, A. D. 1891.

[Seal of the Supreme Court, State of Minnesota.]

C. P. HOLCOMB,
Clerk of the Supreme Court of Minnesota.

2 STATE OF MINNESOTA:

Supreme Court, April Term, 1889.

STATE OF MINNESOTA *vs.* CERTAIN LANDS IN REDWOOD COUNTY FOR TAXES REMAINING DELINQUENT THEREON ON THE FIRST MONDAY OF JANUARY, 1888.	No. 12.

The facts in the above-entitled action having been duly certified to this court by Hon. B. F. Webber, judge of the district court in and for the county of Redwood, ninth judicial district, State of Minnesota, before whom the same was tried, and the cause being on the calendar of this court at the present term thereof was orally argued and submitted on April 24th, 1889, and after due consideration the court, on May 24th, filed its decision of said cause, wherein, among other things, it is decided that the law in pursuance of which the taxes on the land of the Winona and St. Peter Land Company, situated in said county of Redwood, involved in the above-entitled action, were levied is unconstitutional in so far as said law author-

izes interest to be added to the tax; and, further, that the penalties sought to be enforced in said action cannot be imposed; and it being further determined by said decision that all taxes sought to be enforced in said proceedings where the right to institute the proceedings for their enforcement accrued more than six years before these proceedings were instituted are barred by the statute of limitations and cannot be enforced against the land, and this
3 court having directed the district court to modify its judgment in said action in accordance with said decision:

Now, therefore, on motion of Tawney and Randall, attorneys for the Winona and St. Peter Land Company, and in pursuance of the above direction of this court and the statute in such case made and provided, it is ordered and the district court — and for the county of Redwood and State of Minnesota is hereby directed to ascertain the amount of interest and penalties included in the amount of its judgment for taxes assessed and extended against the lands of said land company in 1886, and ascertain also the amount of taxes where the right to enforce the payment of the same by action accrued more than six years before the commencement of this action, and exclude and deduct all of said interest and penalties and also all taxes barred by the statute of limitations and above indicated, and enter judgment for the amount, less the amount so deducted.

Dated July 11th, 1889.

J. D. JONES,
Clerk of Supreme Court, Minn.

Endorsed: 5674. State of Minnesota supreme court. April term, 1889. State of Minnesota *vs.* Certain Lands in Redwood County for Taxes Remaining Delinquent and Unpaid Thereon on the First Monday of January, 1888. Order. Filed July 11, 1889. J. D. Jones, clerk. Entered, pages 6 & 7, Book "F" of Orders.

4 STATE OF MINNESOTA:

5674.

Supreme Court, April Term, A. D. 1891.

STATE OF MINNESOTA *vs.* CERTAIN LANDS IN REDWOOD COUNTY FOR Taxes Remaining Delinquent and Unpaid Thereon on the First Monday of January, 1888.	No. 12. Syllabus.

"If any real or personal property shall be omitted in the assessment of any year or years, and the property shall thereby escape taxation, when such omission shall be discovered the county auditor shall enter such property on the assessment and tax books for the year or years omitted, and he shall assess the same, and extend all arrearages of taxes properly accruing against such property, with 7 per cent. interest thereon from the time said taxes would have be-

come delinquent." Laws 1881, ch. 5. Held, that so far as this act provides for the assessment of the amount of the "original" tax it is valid. Although a land-owner has no notice or opportunity of being heard in the manner of making the assessment and extending the tax by the county auditor, the act is not repugnant to the constitutional provision that property shall not be taken without "due process of law," for the reason that in the proceedings under the general tax law to obtain judgment against the land he has notice and an opportunity of interposing his defenses to both the assessment and the tax.

5 But held that the provision of the act adding "back" interest to the tax is invalid, as being unequal taxation, for the reason that until the amount of the tax is ascertained the owner has no opportunity of paying it and is not in default, and the person is chargeable with interest only upon contract to pay it or for some default of legal duty on his part.

Held, also, that "penalties" for non-payment of taxes can only be imposed after the tax-payer has had an opportunity to pay and fails to do so. Hence, where part of a tax is illegal and the party has had no opportunity of paying the legal part alone and he interposes and maintains a defense to the illegal part, the 10 and 5 per cent. penalties previously imposed under section 69 of the general tax law were wholly unauthorized and invalid (the party not having been then in default) and no part of them should be included in the judgment.

Held, also, that proceedings under the tax law to obtain judgment against the land are "an action upon a liability created by statute," and therefore, under the provisions of Gen. St. 1878, ch. 66, sec. 12, the six years limitation prescribed by section 6 of the same chapter applies, overruling County of Brown *v.* Winona & St. Peter Land Co., 38 Minn., 397.

6 STATE OF MINNESOTA

5674.

Supreme Court, April Term, A. D. 1889.

STATE OF MINNESOTA
vs.
CERTAIN LANDS IN REDWOOD COUNTY FOR TAXES REMAINING DELINQUENT AND UNPAID ON THE FIRST MONDAY OF JANUARY, 1888. } No. 12. Opinion.

These proceedings, which were certified to this court pursuant to section 80, ch. 11, Gen. St. 1878, having been inadvertently submitted at the late October term, without argument, and some of the points intended to be raised not having been considered or decided, the decision filed therein (41 N. W. Rep., 465) was vacated and the case set for re-argument at the present term. The lands in question are included in that part of the land grant of the Winona & St. Peter Railroad Company to which the "Barney party" and their

successor in interest, the Winona & St. Peter Land Company, was entitled under the agreement of October 31, 1867 (Ex. W.), already several times before this court. These lands were conveyed from time to time (beginning with the year 1869) by the State to the railroad company, in which the legal title remained until March, 1887, although the equitable title passed immediately, under the agreement referred to, to the Barneys or their successor. None of the lands were assessed or any steps taken to enforce any taxes against them until 1886, when, in pursuance of the provisions
7 of Gen. St. 1878, ch. 11, sec. 113, as amended by chapter 5, Laws 1881, and section 23, ch. 2, Laws 1885, the county auditor entered them upon the assessment and tax books, assessed them, and extended taxes against them on the tax-list for the current year for each year subsequent to the dates when the lands were conveyed by the State to the railway company, and included in the amount of such taxes interest thereon from the time they would have become delinquent had they been assessed in the proper years. The taxes remained unpaid, and, having become delinquent, these proceedings were instituted in January, 1888, to enforce collection by obtaining judgment against the lands. That these lands became taxable immediately upon their conveyance by the State to the railroad company is no longer an open question in this court. State *v.* Winona & St. Peter R. Co., 21 Minn., 472; County of Brown *v.* Winona & St. Peter Land Co., 38 Minn., 397; County of Brown *v.* Winona & St. Peter Land Co., 39 Minn., 380. The constitutionality of the statute under which these taxes for past years were assessed is now attacked upon grounds not raised or not specially urged in former cases. These are, in brief, three: First, that it violates section 1, art. 9, of the constitution of the State, which requires equality and uniformity of taxation; second, that it violates section 7, art. 1, of the same instrument, which provides that no person shall be deprived of his property without due process of law; third, that even if this mode of assessment can be sustained the provision requiring 7 per cent. interest to be added from the time the tax would have become delinquent if assessed in the proper year is invalid
8 as being unequal taxation.

1. The burden of appellant's argument in support of the first proposition seems to be that the legislature has no power to authorize a tax for past years upon property theretofore omitted when all the purposes of taxation for such years have been fully subserved; that taxes can only be levied to defray the expenses of the State and local government, and that if these back taxes are levied and collected there is now no object to which they could be applied; that they would be a mere idle surplus in the treasury; that the fact that in past years lands have been omitted cannot be made the basis of present taxation. The grand fallacy in this argument is in assuming that statutes like the one under consideration are acts authorizing original taxation. The tax was a debt or liability which the land owed in the year when it ought to have been assessed. Such statutes are purely remedial in their nature and only go to confirm pre-existing rights by adding to the means

of enforcing existing obligations, and it can hardly be necessary at this day to argue that wherever property has escaped payment of its share of the public burdens it is competent for the legislature to provide for its assessment or reassessment for back years, and for that purpose it may adopt any method which it might have originally adopted for the enforcement of the collection of taxes. There is no difference in principle between a case where property has escaped taxation by reason of its entire omission from the assessment-rolls and a case where it has escaped by reason of defects in attempted proceedings for the enforcement of the tax. In either case the debt or liability for its share of the public burdens remains, and it may be ascertained and enforced in any subsequent year, and the owner cannot object to any particular method adopted for that purpose provided it operates equally and justly. The principle of all the cases is that the taxing power, when acting within its legitimate sphere, is one which knows no stopping place until it has accomplished the purpose for which it exists, viz., the actual enforcement and collection from every lawful object of taxation of its proportionate share of the public burdens, and, if prevented by any obstacles, it may return again and again until, the way being clear, the tax is collected. This right to assess or reassess for back taxes under appropriate legislation has been fully recognized by this court in County of Olmsted *v.* Barber, 31 Minn., 256, and County of Ramsey *v.* Chicago, Mil. & St. Paul R'y Co., 33 Minn., 537. It is laid down as the unquestioned law by every text-writer. Cooley, Tax'n, 309; Blackw., Tax Titles, secs. 325, 951; Burroughs, Tax'n, sec. 93; Welty, Assessm., sec. 197; 2 Dill., Mun. Corp., 814. It is supported by an unbroken line of decisions not only in cases where an abortive attempt to enforce the tax had been previously made, but also in cases where it had been assessed against the wrong person, or where, as in this case, property had entirely escaped assessment. Fairfield *v.* People, 94 Ill., 244; People *v.* Board of Assessors, 92 N. Y., 430; City of Wheeling *v.* Hawley, 18 W. Va., 472; Harwood *v.* North Brookfield, 130 Mass., 561; Hubbard *v.* Garfield, 102 Mass., 72; Byram *v.* Detroit, 50 Mich., 56; Overing *v.* Foote, 43 N. Y., 290; North Carolina R. Co. *v.* Commissioners, 82 N. C., 259; Mills *v.* Charleton, 29 Wis., 400. The fact that the public expenses have been paid for the years in which the taxes were omitted, or that the particular public purposes for which they were originally required have been met with other funds, or that the collection of the omitted taxes may temporarily create a surplus of public revenue, presents no constitutional ground why omitted property should continue to escape its due share of taxation. When collected, these taxes will still belong to the public, and, like any other surplus, be subject to future appropriation, and thereby lessen future taxation upon those who have already paid more than their share. Village of Hyde Park *v.* Ingalls, 87 Ill., 11; Fairfield *v.* People, *supra*.

2. Appellant's second point, to wit, that this statute violates section 7, art. 1, of the constitution, is predicated upon the assumption that it provides for the assessment of these back taxes without no-

tice to the property-owner and without giving him any opportunity of being heard in the matter. Without following counsel through their exhaustive arguments upon this point, it is sufficient to say that it seems to proceed upon what we consider two false assumptions, to wit: First, that in proceedings in the exercise of the taxing power the property-owner is entitled to notice and to be heard in each preliminary step in the proceedings, *pari passu* with their progress, and, second, that under the tax law (Gen. St. 1878, ch. 11, secs. 75, 79) the defenses which he may interpose by answer when the State applies for judgment are so restricted as not to include all the objections which go to the merits of the proceedings.

11 Where, as in the present case, the tax is levied on property, not specifically, but according to its value, to be ascertained by some person appointed for that purpose, undoubtedly a party is entitled to notice and an opportunity to be heard, but we know of no case where it was ever held that a party was entitled to notice of and to be heard in each step in tax proceedings as it is taken. We doubt whether any tax law ever provided for any such thing. The principle running through all the cases is that a law does not infringe upon the constitutional provision under consideration if the property-owner has an opportunity to question the validity or amount of the tax either before that amount is determined or in subsequent proceedings for its enforcement. Whenever by law a tax is imposed upon property, and those laws provide for a mode of confirming or contesting it in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law. Davidson *v.* New Orleans, 96 U. S., 97; Hagar *v.* Reclamation District, 111 U. S., 701.

This right is fully given under the sections of the tax law already referred to. Within 20 days after the last publication of the delinquent list any person may, by answer, interpose any defense or objection he may have to the tax. He may set up as a defense that the tax is void for want of authority to levy it, or that it was partially, unfairly, or unequally assessed. Com'rs of St. Louis

12 Co. *v.* Nettleton, 22 Minn., 356. He may set up as a defense *pro tanto* that a part of a tax has not been remitted, as required by some statutes. Com'rs of Houston Co. *v.* Jessup, *id.*, 552. That the land is exempt, or that the tax has been paid. County of Chicago *v.* St. Paul & Duluth R. Co., 27 Minn., 109. That there was no authority to levy the tax, or that the special facts authorizing the insertion of taxes for past years in the list did not exist, or any omissions in the proceedings prior to filing the list, resulting to his prejudice. County of Olmsted *v.* Barber, 31 Minn., 256. The filing of the list is the institution of an action against each tract of land described in it for the recovery of the taxes appearing in the list against such tract, and tenders an issue on every fact necessary to the validity of such taxes. Chauncey *v.* Wass, 35 Minn., 1. The only limitation or restriction upon the defenses or objections which may be interposed is that contained in section 79, to

the effect that if a party interposes as a defense an omission of any of the things provided by law in relation to the assessment or levy of a tax or of anything required by any officer to be done prior to filing the list with the clerk, the burden is on him to show that such omission has resulted in prejudice to him, and that the taxes have been partially, unfairly, or unequally assessed. This relates not to want of authority to levy the tax, but to some omission to do or irregularity in doing the things required to be done in assessing or levying a tax otherwise valid. Com'rs of St. Louis Co. *v.* Nettleton, *supra*. And certainly, in justice or reason, a party cannot complain that when he objects to a tax on the ground of
13 some omission or irregularity in matters of form he is required to show that he was prejudiced.

The appellant lays much stress upon the fact that in the case of the assessment of "back taxes" the statute gives none of the opportunities for the correction of unjust or unequal valuations by local boards of equalization which it furnishes in the case of original taxation for a current year. This of itself is no proof that the law is invalid. The legislature is not bound to adopt the same method of procedure in both cases. The only limitation upon its discretion in the matter is that it must adopt the constitutional method—one which it might have authorized for original taxation had it seen fit to do so.

The point is made that the act of 1881 provides no adequate means of making an assessment or valuation of property for the omitted years, and therefore it fails to satisfy the constitutional requirements that property shall be taxed according to its value (article 9, sec. 3), and that all taxes shall be as nearly equal as may be, and the valuation of all property on which taxes are levied equalized and uniform throughout the State (article 9, sec. 1), and considerable stress is laid upon the supposed difficulty in getting at the actual value of property at a date more or less remote in the past. It is true that the act in question merely appoints the county auditor the assessor and makes it his duty to assess the property, without specifically providing on what basis he shall fix its valuation or what means he shall adopt to ascertain it; but it is
14 not to be assumed, for the purpose of invalidating the statute, that it contemplated or authorized the assessment upon an unconstitutional basis, as, for example, the value of the property today. On the contrary, it must be understood as providing for an assessment upon the only basis that could be lawfully adopted, to wit, the value of the property at the time the land should have been assessed. And while the law does not specifically provide what means the auditor shall take to ascertain that fact, yet, as it is made his duty to ascertain it, it is also impliedly his duty to adopt such means of doing so as are reasonably within his reach, and from these to exercise his best judgment. The difficulty in the way of arriving at an exactly accurate result on account of the lapse of time is no fatal objection to the statute. Uniformity, as near as may be, is all that the constitution requires. Moreover, if the auditor, either from mistake or negligence, makes an unfair or unequal as-

sessment the owner has an opportunity of being heard and having this corrected in the proceedings instituted to obtain judgment against the land, and this fact is also an answer to the suggestion, so frequently made by appellant, that the assessment is made arbitrarily by the auditor, without notice or opportunity to be heard on the part of the owner. But it is said that this opportunity is only given him after the taxes are said to be delinquent, and the penalties of 10 per cent. and 5 per cent. are added to them on the 1st of June and the first Monday of January following. Assuming, without deciding, that the provisions of the general tax law as to
15 the addition of these penalties are applicable to "back taxes" assessed under this statute, the argument proceeds upon a false premise; for, inasmuch as the whole tax extended against a tract of land is an entirety, and the owner cannot pay a part without paying the whole, if any part of the tax is illegal he is not in default, and if he maintains a defense to a part of it the penalties on the whole fall to the ground, precisely as if the whole tax were illegal.

In their reply brief counsel advance a new point against the validity of the act. Briefly stated, it is this: Conceding that the opportunity to answer and be heard in the proceedings to obtain judgment against real property satisfies the constitutional requirement as to "due process of law," yet the act in question provides for the assessment and taxation of both real and personal property, and as it makes no provision for the collection of such taxes, they can be collected, if at all, only under the provisions of the general tax law; that under that law (section 58, as amended in 1885) personal taxes become delinquent on March 1st, and are enforceable, after April 1st, by distress of property; that, as this is prior to any notice or opportunity to the tax-payer to be heard, therefore the act is void as to personal taxes, and, if so, the whole act is void, first, because its purposes are so connected that it cannot be presumed that the legislature would have passed it for the purpose of collecting taxes for "omitted" years on real property alone, and, second, to hold it valid as to taxes on realty and not on personalty would render it repugnant to the constitutional provisions requir-
16 ing equality of taxation. Without admitting the correctness of the other postulates in this line of reasoning, we think the assumption is erroneous that these personal taxes could only be collected by proceedings under the general tax law. It will be observed that the objection suggested is not to the act of 1881 providing for the assessment of the taxes, but to the supposed inapplicability of the provisions of section 58 for the purpose of enforcing them, because, if applied, they would be, under the circumstances, unconstitutional. But, assuming that section 58 is for that reason inapplicable and also assuming that the taxes could not be enforced under the provisions of section 60 by serving a citation on the party to show cause why judgment should not be rendered against him—in short, assuming that no provision of the law would be applicable—still there is a valid tax constituting a statutory liability against the property-owner to the State which, in the absence of

any law providing any other method, might be enforced by an ordinary personal action.

3. Had the legislature the right in the case of the assessment of taxes for past years to include in and add to these taxes interest from the date when they would have become delinquent if they had been levied in the proper year? We think not. To render a person chargeable with interest there must be a promise, express or implied, to pay it, or some default of duty on his part in not sooner paying the money. Sibley *v.* County of Pine, 31 Minn., 201. In a case like the present there is neither. If the law required a land-
owner to list his property for taxation, his failure to do so,
17 whereby it escaped payment of the tax at the proper time,
would constitute such a default of duty as would justify charging him with interest for the time during which the public was deprived of the use of the money; or if the amount of the tax had been ascertained, so that he had an opportunity to pay it, but, instead of doing so, saw fit to defeat its present collection by interposing an objection on the ground of some defect or irregularity in the proceedings, and a reassessment thereby became necessary, we can see how it might be urged that he could be charged with interest during the time that the collection of the tax was postponed, for the tax-payer himself would be in a sense responsible for the delay; but where the land has been entirely omitted from the assessment-rolls the owner is not in default. He is not required to list his land. The neglect or omission is wholly that of the public officers. He has never had an opportunity to pay the tax, for the amount of it has never been ascertained. If, under such circumstances, in the absence of any default on his part, the legislature can impose interest retrospectively, there is no reason why it might not also impose certain penalties for the non-payment of the tax, for both stand, in this respect, on the same footing. Both are in the nature of damages for a default of legal duty. The only difference is that one is in its nature compensatory, while the other is punitive. The effect of adding this back interest to the amount of the tax, in the absence of any default on the part of the owner, is to make his taxes that much larger than those of his neighbor on property of
the same value. This, in our judgment, would be in viola-
18 tion of the principle of equality of taxation enjoined by the
Constitution. This provision of the statute we therefore hold invalid. See State *v.* Mayor of Jersey City, 37 N. J. Law, 39.

4. The certificate of the trial judge does not show that any "penalties" were included in the judgment, but counsel have made and filed a stipulation to the effect that in the judgment against these lands there was included not only the taxes against them for each year, as claimed, and interest as provided in the act of 1881, but also a penalty of 10 per cent. upon said taxes and interest as accruing thereon June 1, 1887, as being delinquent, and also a further penalty of 5 per cent. as accruing January, 1888, and that these facts may be taken into consideration and passed upon by the court the same as if they appeared in the certificate of the district judge. It will be observed that these penalties, unlike those attempted to

be included in the case of County of Brown *v.* Winona & St. Peter Land Co., 39 Minn., 389, are penalties which are assumed to have accrued (under the provisions of section 69 of the general tax law as amended in 1885) after the taxes had been actually assessed in 1886 and became "delinquent" June 1, 1887. It is claimed that the act of 1881 gives no warrant for the exaction of "penalties," and that the provisions of the general tax law referred to have no application to "omitted taxes." It is also urged that the utmost power that the State can constitutionally exert is to impose penalties for non-payment of taxes validly assessed from the time, and only from the time, when the same, after due notice to pay them, have become delinquent; that the first notice which the tax-payer has that "omitted" taxes have been assessed against his land is when the delinquent list is published in January of the following year, after the 10 and 5 per cent. penalties have both already accrued and been added to his tax; in short, that a penalty for a default is imposed before any default has in legal contemplation been made.

While conceding the force of these positions, we are not called upon to pass upon either of them in the present case. One thing is very certain, that a penalty in any form cannot be imposed until a party is in default in some legal duty. A penalty for the non-payment of a tax cannot be imposed until the person has an opportunity to pay it and fails to do so. What we have heretofore said regarding "interest" is equally applicable to penalties. Now, as the whole tax extended against a tract of land is an entirety, the owner cannot pay a part of it without paying the whole; and if a part of it is illegal and he pays the whole, ordinarily it would be a voluntary payment and he could not recover back the illegal part; hence in such case his only remedy is to wait until proceedings are commenced to enforce judgment against his land, and then defend against the illegal part of the tax, and until it is deducted by the judgment of the court he has had no opportunity to pay the valid part of the tax, and consequently has been guilty of no default. Therefore, whether it be a case of a "current" tax or an "omitted" tax, if the party succeeds in his defense as to part of it as illegal all the penalties on the whole tax previously imposed for its non-payment were unauthorized and cannot be included in the judgment. This is precisely the present case. That part of the tax assessed and extended against the lands in 1886 as "back interest" was, as we have already decided, unauthorized and illegal. To that extent appellant had a valid defence to the tax, which it had a right to interpose and in which it was entitled to succeed. Until the correct amount of the taxes had been determined by excluding his illegal addition, it had not been in default and no penalties could be legally imposed.

5. The remaining question is whether the statute of limitations applies to proceedings, like the present, to enforce payment of delinquent taxes. It is elementary that time never runs against the State unless there is an express provision or necessary implication to that effect, but our statute provides "that the limitations pre-

scribed for the commencement of actions shall apply to the same actions when brought in the name of the State or in the name of any officer or otherwise for the benefit of the State in the same manner as to actions brought by citizens." Gen. St. 1878, ch. 66, sec. 12. The preceding sections of the same chapter divide actions into classes according to their character, and prescribe the limitation for each, among which are "actions upon a liability created by statute," the limitation for which is fixed at six years. In County of Brown *v.* Winona & St. Peter Land Co., 38 Minn., 397, we held that the statute did not apply to proceedings like the present, because they are not analogous to any of the classes of actions enumerated. The question was very briefly argued, the atten-
21 tion of both court and counsel being mainly directed to the principal contention in the case, which was whether these lands were subject to taxation prior to the final determination of the litigation as to their ownership between the railroad company and the land company; hence the question of the statute of limitations was disposed of very briefly, and perhaps without the consideration on part of either counsel or court which its importance deserved. It is undoubtedly a matter of more public interest than was then realized. It is a fact of common knowledge that in early years a large part of the lands in the State was not subject to taxation because they belonged to the United States or to the State or Territory or to railroad companies whose lands were exempt. These lands were from time to time passing by entry or conveyance to other parties, in whose hands they became immediately taxable, but the public records in the several counties did not usually show the fact; hence, for this and other reasons, the taxability of the lands was overlooked or not discovered by the public officers, and the property escaped taxation, perhaps for years. It was not infrequent that other lands were, by oversight or mistake, omitted or dropped from the assessment-rolls, a thing that might naturally be expected in the formative period of the governmental machinery of a new community. Many of these lands have since repeatedly changed ownership and passed into the hands of innocent purchasers, who relied upon an examination of the public records or an abstract of title; hence, if after the lapse of a quarter or a third of a century
22 the State can still proceed to assess taxes against the property for the years when it thus escaped taxation, it will be readily seen that the consequences would be very serious in the way of incumbering or unsettling titles. Indeed, under such a rule a man could hardly ever be absolutely certain that his title was clear. While this is no ground for a court indulging in judicial legislation, it certainly makes it eminently proper that the question be carefully reconsidered on its merits.

That a tax is "a liability created by statute" we think admits of no doubt, either upon principle or authority. City of San Francisco *v.* Jones, 20 Fed. Rep., 188; City of San Francisco *v.* Luning, 73 Cal., 610; State *v.* Yellow Jacket Silver Mining Co., 14 Nev., 220, 226. Therefore, if instead of these proceedings against the land the statute had, as in many jurisdictions, authorized a personal

action against the owner, unquestionably it would have been an action upon "a liability created by statute" and the six years' limitation would apply. The only question, then, is, Whether it makes any difference because the proceedings are against the land instead of against the owner? Does this fact so destroy their analogy to an action as to make the statute inapplicable? Statutes of limitation are statutes of repose, which tend to the peace of society, and it is a cardinal rule that they are to be construed liberally, so as to effectuate the intention of the legislature. It is also well settled that such statutes, though in terms applicable only to "actions," are to be applied as a rule for all proceedings that are analogous in their nature to actions, so as to make the right sought to be
23 enforced, and not a form of procedure, the test as to whether or not the statute applies. Upon this principle they are held to apply to all claims which may be the subject of actions, however presented; also that they furnish a rule for cases analogous in their subject-matter, but for which a remedy unknown to the common law has been provided. They have also been applied by analogy to proceedings in admiralty, to claims in bankruptcy or in probate court, although not within the strict letter of the statute. Hart's Appeal, 32 Conn., 520, 540; Forster *v.* Cumberland Valley R. Co., 23 Pa. St., 371. The legislature having adopted the policy of making the statutes of limitation applicable to the State, we ought to give them as liberal construction against the State as against citizens. A tax being a liability created by statute and the filing of the delinquent list being, as the statute declares and as we have held, the institution of an action against the land for the recovery of the tax appearing against it in the list, and, inasmuch as the nature of the right sought to be enforced, and not the mode of procedure, is the test, we are unable to see why it should make any difference whether the action is *in rem* or *in personam*—against the property instead of against its owner. We have, therefore, come to the conclusion that these proceedings are, within the meaning of the statute, "an action upon a liability created by statute," and are barred as to all taxes for the enforcement of which such proceedings might have been instituted more than six years before the commencement of the present proceedings had such taxes been assessed in the proper year.

24 The record as certified to us does not furnish the data from which to determine what particular taxes were barred at the time of the commencement of these proceedings. The matter is therefore remanded to the district court to amend or modify its judgment so as to exclude or deduct therefrom all interest which was included in the amount of taxes as assessed and extended against these lands in 1886, also all penalties and also all taxes barred by the statute of limitations, according to the rule laid down in this opinion.

MITCHELL, *J.*

25 STATE OF MINNESOTA:

Supreme Court.

STATE OF MINNESOTA
vs.
CERTAIN LANDS IN REDWOOD COUNTY FOR TAXES REMAINING Delinquent and Unpaid Thereon on the First Monday of January, 1888.

It appearing to the court that the above-entitled matter was inadvertently submitted to the court, and without argument or briefs therein, and that the points intended to be raised were not considered and passed upon in the decision filed therein:

Now, therefore, on motion of J. M. Gilman, attorney for the owner of the lands involved in said proceeding, and by consent of the attorney general, it is hereby ordered that the decision and order filed in said proceeding Jan. 31st, 1889, be, and the same is hereby, vacated and set aside, and that said cause be reinstated upon the calendar for future hearing.

Dated Feb. 28, 1889.

D. A. DICKINSON,
Associate Justice.

Endorsed: 5674. Order vacations opinion or decision. Filed Feb'y 28, 1889. J. D. Jones, clerk.

26 STATE OF MINNESOTA:

Supreme Court.

STATE OF MINNESOTA
vs.
CERTAIN LANDS IN REDWOOD COUNTY FOR TAXES REMAINING Delinquent and Unpaid Thereon on the First Monday of January, 1888.

It is hereby agreed and stipulated as a fact that the clerk of the district court of said Redwood county, in entering the judgments against the several tracts of lands for taxes involved in the above-entitled proceeding, included therein not only the taxes assessed against each tract for each year as claimed and interest thereon, as provided in chapter 5 of the General Laws of 1881, but also a penalty of ten per cent. upon said taxes and interest as accruing thereon June 1st, 1887, as being delinquent, and also a further penalty of five per cent. on said taxes and interest as accruing thereon January, 1888, on account of the non-payment of said taxes and interest, and that said facts may be taken into consideration and passed upon by this court the same as if fully stated and appearing in the state-

ment of facts certified to this court by the district judge of said Redwood county.

J. M. MADIGAN AND
MOSES E. CLAPP,
Att'ys for Pl'ff.

Per MOSES E. CLAPP.
J. M. GILMAN,
Att'y for Defendant.

Endorsed: 5674. Stipulation No. 1. Filed May 24, 1889. J. D. Jones, clerk.

27 STATE OF MINNESOTA:

5674.

Supreme Court, October Term, A. D. 1888.

STATE OF MINNESOTA
vs.
CERTAIN LANDS IN REDWOOD COUNTY FOR TAXES REmaining Delinquent and Unpaid Thereon on the First Monday of January, 1888. } Syllabus.

Section 113, ch. 11, Gen. St. 1878, as amended by Laws 1881, ch. 5, sec. 1, providing for assessing taxes upon property for past years in which such taxes had not been assessed, does not authorize the including in such assessment of penalties for such years, following County of Brown *v.* Winona & St. Peter Land Co., 39 Minn.

28 STATE OF MINNESOTA:

5674.

Supreme Court, October Term, A. D. 1888.

STATE OF MINNESOTA
vs.
CERTAIN LANDS IN REDWOOD COUNTY FOR TAXES REmaining Delinquent and Unpaid Thereon on the First Monday of January, 1888. } Opinion.

This case is, except as to the description of the lands involved, precisely similar to the case of State of Minnesota *v.* Winona & St. Peter Land Co., 40 N. W. Rep., 166 (decided at the present term). The decision in this case, of course, follows the decision in that. The court below will therefore ascertain how much penalties were included in the assessment and modify its judgment by excluding the amounts of them from the amounts for which judgment was rendered.

GILFILLAN, *C. J.*

29 The Supreme Court of the United States.

THE STATE OF MINNESOTA, Plaintiff and Respondent,
vs.
CERTAIN LANDS IN REDWOOD COUNTY FOR TAXES REMAINING Delinquent and Unpaid Thereon the First Monday of January, 1888, The Winona & St. Peter Land Company, Defendant and Appellant.

In the matter of the petition of the Winona & St. Peter Land Company and owner of the lands referred to in the above-entitled action.

Assignments of Errors.

Now comes the Winona & St. Peter Land Company, a corporation and the owner of the land above referred to, by James A. Tawney, its attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

I.

That the assessment and taxation of the lands involved in said action is in conflict with section ten (10) of article two (2) of the Constitution of the United States in this, that it violates and impairs the obligation of the contract existing between the Winona & St. Peter Railway Company in respect to the taxation of the land of that company before the same are sold and conveyed.

II.

That the act of the legislature of the State of Minnesota under and in pursuance of which said lands were assessed and said taxes were levied is in conflict with the fifth amendment of the Con-
30 stitution of the United States, in that it authorizes the assessment and taxation of the property of the citizen without notice to him, and affords no opportunity to the owner of property to appear and be heard in or appeal from the assessment proceedings thereby authorized.

(*a.*) Under the act above referred to the officers of the several counties of the said State of Minnesota are authorized, and in certain cases it is made their duty, to assess and tax the property of the citizen without notice and without giving an opportunity to be heard, and, if the tax is not paid, such officers are authorized to sell the property for the taxes so assessed for past years, thus depriving the owner of his property without due process of law.

III.

That the county auditor of the county in which said lands are situated had no right to assess and tax the lands of said company.

IV.

That the supreme court of the State of Minnesota erred in holding the lands of said land company to be taxable immediately upon

their conveyance by the State to the railroad company, and that therefore the lands involved in this action are liable for all the taxes assessed and levied against the same for the six years next preceding the commencement of said action to enforce said taxes.

V.

That said supreme court likewise erred in holding that the assessment and taxation of the property of the citizen under the
31 act above referred to and without notice or the right to appear or appeal does not deprive the owner of his property without due process of law.

Wherefore the said Winona & St. Peter Land Company prays that the said judgment of the supreme court of the State of Minnesota be reversed, and for such other and further proceedings in the premises as may be by your honorable court deemed just and necessary.

JAMES A. TAWNEY,
Att'y for Def't & Appellant.

Winona, Minn.

Endorsed: 5674. U. S. of America. The Supreme Court of the United States. The State of Minnesota *vs.* The Winona & St. Peter Land Company. Assignment of errors. Filed June 12, 1891. C. P. Holcomb, clerk. James A. Tawney, attorney for defendant & appellant, Winona, Minn.

32 STATE OF MINNESOTA, }
County of Redwood. }

District Court, Ninth Judicial District.

STATE OF MINNESOTA
vs.
CERTAIN LANDS IN REDWOOD COUNTY FOR TAXES REMAINING Delinquent and Unpaid Thereon on the First Monday of January, 1888.

To the honorable supreme court of the State of Minnesota:

The above-entitled matter was a proceeding to enforce the payment of taxes and penalty delinquent on lands in Redwood county on the first Monday of January, 1888. The Winona & St. Peter Land Company, a corporation duly organized and existing under the laws of this State, filed its answer in said proceeding, setting up its title to a portion of said lands and its objections to the enforcement of the alleged delinquent taxes and penalty against the same, a copy of which answer is hereto attached and made a part hereof. Said matter duly came on for hearing before me in the district court in said Redwood county and was duly heard and a decision rendered therein adverse to said land company and to the objections made by it against said taxes and penalty, and said land company

having requested the facts in the case and my decision thereon to be certified to the supreme court of the State under section 80 of chapter 11 of the Compiled Statutes of 1878, and it appearing to me that the case falls within the provisions of said section:

Now, therefore, I hereby certify to the following facts as
33 bearing upon the question raised by said land company in said proceeding:

First. The said Winona & St. Peter Land Company is the owner of the lands described in its said answer, which lands were acquired by the Winona & St. Peter Railroad Company, as the successor in interest to the Transit Railroad Company, under the acts of Congress and of the late Territory and present State of Minnesota referred to in said answer, and were acquired for the purpose and in the manner as stated in said answer.

Second. That on the 31st day of October, 1867, the said Winona & St. Peter Railroad Company, party of the second part, entered into a certain agreement with Danford N. Barney *et al.*, as parties of the first part, for the sale by the said railroad company to said parties of the first part of certain of its lands acquired or to be acquired under said acts of Congress and acts of the late Territory and present State of Minnesota, a copy of which agreement is hereto attached and made a part thereof, marked Exhibit "W," and that the lands described in the answer of said land company are a portion of the lands referred to in said agreement.

Third. That the State conveyed lands to said Winona & St. Peter Railroad Company under said acts of Congress and said acts of the late Territory and present State of Minnesota from time to time as said railroad company became entitled to the same, and that the State conveyed the lands described in the defendant's answer to said rail-
road company prior to any of the years for which taxes are
34 claimed thereon in said delinquent list; that the said Winona & St. Peter Railroad Company conveyed to the said Danford N. Barney and his associates, parties of the first part in said agreement, Exhibit "W," such of said lands as it admitted it was obligated to convey under said agreement; that the said Danford N. Barney and his associates, parties of the first part of said agreement, claimed a large quantity of lands under said agreement which the railroad company disputed their liability to convey to them; that thereupon, in 1879, the said Barney and his associates, parties of the first part in said agreement, brought suit in the United States circuit court for the district of Minnesota against the said Winona & St. Peter Railroad Company to compel it to convey to them the lands to which they claimed to be entitled under said agreement, but which the said railroad company refused to convey, including the lands now owned by the said Winona & St. Peter Land Company and involved in these proceedings; that said suit was pending in said circuit court and in the Supreme Court of the United States until March, 1887, when a final decree was rendered and entered in said cause in said circuit court, ordering and decreeing the said Winona & St. Peter Railroad Company to convey a large quantity of lands to the said Winona & St. Peter Land Company at the

request of and as the successor in interest under said agreement of the said Barney and his associates, parties of the first part therein, which final decree embraced the lands described in said answer and involved in these proceedings, which decree is hereby made a part of this statement of facts as Exhibit "E."

35 Fourth. That none of said lands described in said answer were ever assessed for taxes and no steps taken to enforce any taxes against the same or any part thereof prior to the year 1886; but in 1886, under and in pursuance of the provisions of section 113 of chapter 11 of the Compiled Statutes of 1878, as amended by chapter 5 of the Laws of 1881, and section 23 of chapter 2 of the Laws of 1885, taxes were assessed against all of said lands for each year subsequent to the date when the same were conveyed by the State to said Winona & St. Peter Railroad Company and subsequent to the execution of said agreement, Exhibit "W," including interest as provided in said section 113; that said section 113 as amended as aforesaid, under and in pursuance of which said taxes were assessed, reads as follows: "If any real or personal property shall be omitted in the assessment of any year or years, and the property shall thereby escape taxation, when such omission shall be discovered the county auditor shall enter such property on the assessment and tax books for the year or years omitted, and he shall assess the same and extend all arrearage of taxes properly accruing against such property, with seven (7) per cent. interest thereon from the time said taxes would have become delinquent, and the same shall be extended against such property on the tax-list for the current year. If any tax on the property liable to taxation is prevented from being collected for any year or years by reason of any erroneous proceedings or other cause, the amount of such tax which such property should have paid shall be added to the tax on such property for the current year;" that such assessment upon some of said lands was for each year subsequent to 1869, and upon others for each year subsequent to 1870, and upon others for each year sub-

36 sequent to 1871, and so on, respectively, from the dates when the lands were conveyed by the State to said railroad company; that the mode and manner of making the assessment was in accordance with the provisions of said section 113; that the taxes so assessed were duly returned delinquent, and the present proceedings to enforce the payment of the same are in accordance with the provisions of the statute for that purpose.

Fifth. That the legal title to said lands described in said answer remained in said railroad company from the time when the same were conveyed by the State to said railroad company down to the date of said decree in said circuit court, in March, 1887.

Sixth. That the reason said lands were not theretofore assessed in each year is that neither the township assessors nor the county officers in said Redwood county had any knowledge of the existence of the contract or agreement between the Winona & St. Peter Railroad Company and Barney *et al.*, Exhibit "W," until about the first day of September, 1886, and they presumed said lands were exempt from taxation, and said lands having theretofore escaped the

taxation the said county auditor did assess the same and extend all arrearages of taxes against said lands.

Seventh. That the Winona & St. Peter Land Company is the successor in interest of Danford N. Barney *et al.*, designated as party of the first part in the agreement entered into between the said Winona & St. Peter Railroad Company and the said Danford N. Barney *et al.*, and hereto attached as Exhibit "W."

As conclusions of law from the foregoing facts the court finds:

First. That the provisions of section 4 of chapter 2 of the act of the legislative assembly of the Territory of Minnesota entitled An act to execute the trust created by an act of Congress
37 entitled An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama to aid in the construction of a certain railroad in said State, and granting certain lands to railroad companies therein named, approved May 22d, 1857, wherein it was provided that the said lands so granted shall be and are exempted from all taxation till the same shall be sold and conveyed by said company, constituted a contract between the Territory of Minnesota and the Transit Railroad Company therein named, and that said Winona & St. Peter Railroad Company succeeded to all the rights, property, and franchises of the said Transit Railroad Company acquired under said act.

Second. That the legislature of the late Territory or present State of Minnesota has never passed any act rendering said lands nor any portion thereof taxable until the same were sold and conveyed, nor in any manner violating the obligations of said contract contained in said act.

Third. That immediately upon the Winona & St. Peter Railroad Company acquiring title to said lands described in the defendant's answer the equitable title thereto under said agreement set forth in said Exhibit "W" passed to the parties of the first part named in said agreement (Exhibit W) or their successors, and said lands were then sold and conveyed within the meaning of said section 2 of said act of the legislative assembly of said Territory of Minnesota, and from thenceforth said lands became and were taxable.

38 Fourth. That said lands described in said answer having been omitted in the assessment of taxes for all prior years and having thereby escaped taxation for all years prior to 1886, the county auditor of said county properly entered the same on the assessment and tax books and properly assessed the same and extended all arrearages of taxes which had accrued against the same, and that the tax and penalty named in said delinquent list against each piece and parcel of land described in the defendant's answer except those tracts mentioned in the fourth paragraph thereof has been impartially, fairly, and equally assessed by said auditor for each of the years named in said list.

Fifth. That the collection of any of the taxes against any of the lands described in the defendant's answer for any of the years men-

tioned in the said delinquent list is not barred by the statutes of limitations.

Sixth. That the amount of taxes, penalty, and costs to which each of said pieces or parcels of land is liable, as hereinbefore stated, is a lien upon each of said pieces or parcels of land as against the estate, right, title, interest, claim, or lien of whatever nature, in law or equity, of every person, company, or corporation whatsoever, and that unless the amount to which each of said pieces or parcels is liable be paid, each of said pieces or parcels is liable to be sold, as provided by law, to satisfy such amount to which it is liable.

Let judgment be entered accordingly.

Dated Sept. 19th, 1888.

B. F. WEBBER,
Judge of District Court, 9th Judicial District.

39 *Memoranda.*

The defendant's counsel raise the point that the statute under which the land in question is taxed is unconstitutional as impairing the obligation of the contract contained in the act of the territorial legislature approved May 22d, 1857, wherein it was provided that the lands granted to the railroad company should be exempt from taxation till sold and conveyed.

I am unable to understand what act of the legislature the counsel deems unconstitutional. The general laws relative to the taxability of real estate have, ever since the passage of the act of May 22d, 1857, remained substantially as they were at that time, and the courts of the State have always construed that act as a contract and have held the lands as exempt from taxation till sold and conveyed.

The defendant's counsel seems to have assumed that the decision of the supreme court in State *vs.* R. E. Co., 21 Minn., 472, and State *vs.* Webber, 37 N. W. Rep., 949, construing the Barney contract, were based upon a statute rendering the lands taxable before sold and conveyed, and that such statute must be unconstitutional. I do not understand these decisions as based upon any statute, but as applying the general principles of law to the construction of the Barney contract, and this raises no constitutional question, and no such question is involved in the present case.

R. R. Co. *vs.* Rock, 4 Wall., 177.
R. R. Co. *vs.* McClure, 10 Wall., 511.
Knox *vs.* Bank, 12 Wall., 379.

The entry of the lands upon the assessment and tax books by the county auditor is authorized by section 113 of chapter 11,
40 General Statutes 1878, as amended by chapter 5, General Laws 1881.

Ramsey Co. *vs.* R. R. Co., 33 Minn., 537.

The other points raised in the defendant's brief were decided in the case of State *vs.* R. R. Co., 21 Minn., 472, and State *vs.* Webber, 37 N. W. Rep., 949.

B. F. WEBBER, *Judge.*

The Winona & St. Peter Land Company, against which the court has decided certain points raised by its defence in the above-entitled proceeding, having duly applied to have the same transmitted to the supreme court, and the same being, in the opinion of the court, of great public importance, I hereby certify that the above and foregoing is a brief statement of the facts established bearing upon such points, and of the decision of the court thereon, and that judgment has been duly entered in accordance with said decision and order; and it is hereby ordered that the same be forthwith transmitted to the clerk of the supreme court of the State of Minnesota.

Dated Dec. 8th, 1888.

B. F. WEBBER,
Judge of District Court, 9th Judicial District.

41 STATE OF MINNESOTA, }
Redwood County. }

District Court, Ninth Judicial District.

STATE OF MINNESOTA
vs.
CERTAIN LANDS IN REDWOOD COUNTY FOR TAXES REMAINING DELINQUENT AND UNPAID THEREON ON THE FIRST MONDAY OF JANUARY, 1888. } ANSWER.

In the matter of the proceedings to enforce the payment of taxes delinquent and unpaid upon lands situated in said county of Redwood on the first Monday of January, 1888, the Winona & St. Peter Land Company, a corporation created and organized under the laws of the State of Minnesota, hereby makes answer and states its objections to the enforcement of said alleged delinquent taxes and penalties in respect to the lands owned by it in said county, and which are hereinafter particularly described.

I.

The said Winona & St. Peter Land Company owns the following-described lands, situated in said county of Redwood, to wit:

42	Sec.	Tp.	R.
S. W. ¼ of S. W. ¼, lots 4, 5, & 6	3	110	34
All of	5		
N. ½, S. W. ¼, and W. ½ of S. E. ¼	7		
All	9		
E. ½, E. ½ of N. W. ¼, S. W. ¼ of N. W. ¼, E. ½ of S. W. ¼, and S. W. ¼ of S. W. ¼	15		
All of	17		
All of	19		

	Sec.	Tp.	R.
All of	21		
N. ½, S. E. ¼, E. ½ of S. W. ¼, and S. W. ¼ of S. W. ¼	27		
All of	29		
All of	31		
All of	33		
Lot 2, W. ½ of N. E. ¼, S. E. ¼ of N. E. ¼, S. E. ¼, and W. ½	31	111	34
Lot No. 9	33		
All of	1	110	35
All of	3		
E. ½, N. W. ¼, and E. ½ of S. W. ¼	5		
W. ½ of S. W.	5		
All of	7		
S. ½, N. W. ¼, W. ½ of N. E. ¼, and S. E. ¼ of N. E. ¼	9		
All of	11		
All of	13		
All of	15		
All of	17		
All of	19		
All of	21		
All of	23		
All of	25		
43 All of	27		
E. ½ of N. E. ¼	29		
W. ½ of N. E. ¼, N. W. ¼, and S. ½	29	110	35
All of	31		
E. ½ of N. E. ¼, S. W. ¼ of N. E. ¼, N. W. ¼, and S. ½	33		
All of	35		
Lot 2	5	111	35
E. ½, E. ½ of N. W. ¼, and E. ½ of S. W. ¼	7		
W. ½ of N. W. ¼	7		
Lots 5, 10, and 11	9		
Lots 5 and 6 and S. ½ of S. W. ¼	15		
N. E. ¼ and E. ½ of S. E. ¼	19		
All of	17		
W. ½ and W. ½ of S. E. ¼	19		
N. W. ¼, W. ½ of N. E. ¼, N. E. ¼ of N. E. ¼, and N. ½ of S. W. ¼	21		
S. W. ¼ of S. W. ¼ and S. E. ¼	21		
S. W. ¼ of N. W. ¼ and N. ½ of S. W. ¼	23		
S. E. ¼ of S. W. ¼, S. W. ¼ of S. E. ¼, lots 5, 6, 7, 8, and 9	23		
S. ½, lots 4, 5, and 6, and S. ½ of N. W. ¼ and N. W. ¼ of N. W. ¼	25		
N. ½, S. E. ¼, N. ½ of S. W. ¼, and S. E. ¼ of S. W. ¼	27		
S. ½, N. W. ¼, and S. ½ of N. E. ¼	29		

	Sec.	T'p.	R.
All of	31		
All of	33		
S. ½, N. W. ¼, W. ½ of N. E. ¼, and S. E. ¼ of N. E. ¼	35		
All of	1	109	36
All of	3		
All of	5		
All of	7		
N. ½ of	9		
44 S. ½ of	9	109	36
All of	11		
S. ½ of S. E. ¼	12		
All of	13		
All of	15		
All of	17		
N. W. ¼ and N. W. ¼ of S. W. ¼	19		
N. ½ and S. E. ¼	21		
N. ½, N. ½ of S. E. ¼, S. W. ¼ of S. E. ¼, and S. W. ¼	23		
All of	25		
All of	27		
E. ½, S. W. ¼, and E. ½ of N. W. ¼	29		
All of	31		
N. E. ¼ and S. ½	33		
All of	35		
All of	1	110	36
All of	3		
All of	5		
All of	7		
All of	9		
All of	11		
S. ½, S. ½ of N. E. ¼, N. W. ¼ of N. E. ¼, and S. ½ of N. W. ¼	13		
N. W. ¼ of N. W. ¼	13		
N. ½, N. ½ of S. E. ¼, N. ½ of S. W. ¼, and S. W. ¼ of S. W. ¼	15		
All of	17		
All of	19		
All of	21		
N. E. ¼, S. ½, S. ½ of N. W. ¼, and N. E. ¼ of N. W. ¼	23		
45 S. ½ of	24		
All of	25		
All of	27		
E. ½ of S. W. ¼ and S. W. ¼ of S. W. ¼	28	110	36
N. ½ of N. E. ¼, S. W. ¼ of N. E. ¼, N. W. ¼, and S. ½	29		
All of	31		
All of	33		
All of	35		

	Sec.	Tp.	R.
Lots 3 and 4, S. ½ of N. E. ¼, S. E. ¼, and W. ½	1	111	36
S. ½, S. ½ of N. E. ¼, N. E. ¼ of N. E. ¼, and S. ½ of N. W. ¼	3		
N. E. ¼, S. ½, S. ½ of N. W. ¼, and N. W. ¼ of N. W. ¼	5		
All of	7		
S. E. ¼, N. W. ¼, S. ½ of N. E. ¼ and N. W. ¼ of N. E. ¼, S. ½ of S. W. ¼, and N. E. ¼ of S. W. ¼	9		
All of	11		
N. ½ of N. E. ¼, S. W. ¼ of N. E. ¼, N. W. ¼, and S. ½ of	13		
All of	15		
N. W. ¼ of N. E. ¼, S. ½ of N. E. ¼, N. W. ¼, and S. ½ of	17		
All of	19		
N. ½, N. ½ of S. E. ¼, S. W. ¼ of S. E. ¼, & S. W. ¼	21		
N. ½ of N. E. ¼, S. W. ¼ of N. E. ¼, N. W. ¼, & S. ½	23		
All of 25	25		
All of	27		
All of	29		
All of	31		
All of	31		
All of	33		
W. ½ of N. E. ¼, N. W. ¼, & S. ½	35		
S. ½ of	33	112	36
46 Lots 5, 6, and 7, S. W. ¼, S. ½ of N. W. ¼, and W. ½ of S. E. ¼	35		
All of	1	109	37
All of	3		
E. ½, E. ½ of N. W. ¼, and E. ½ of S. W. ¼	11		
W. ½ of N. W. ¼ & W. ½ of S. W. ¼	11		
All of	13		
All of	15		
All of	27		
All of	35		
All of	1	110	37
All of	3		
All of	11		
All of	13		
All of	15		
All of	23		
All of	25		
All of	27		
All of	35		
All of	1	111	37
S. ½ of N. E. ¼, N. W. ¼, S. E. ¼, & N. E. ¼ of S. W. ¼	3		
S. W. ¼ of S. W. ¼	3		

	Sec.	T'p.	R.
N. E. ¼ of N. E. ¼ & S. W. ¼ of N. E. ¼	10		
N. ½, E. ½ of S. E. ¼, & N. W. ¼ of S. E. ¼	11		
S. ½ of S. W. ¼	11		
E. ½, N. W. ¼, E. ½ of S. W. ¼, & N. W. ¼ of S. W. ¼	13		
E. ½, N. W. ¼, N. ½ of S. W. ¼, & S. W. ¼ of S. W. ¼	15		
N. ½ of N. E. ¼	22		
All of	23		
All of	25		
All of	27		
All of	35		

47 The answer further alleges that said lands above described were acquired by the Winona & St. Peter Railroad Company, a corporation created and organized under the laws of the late Territory and present State of Minnesota with authority to construct that certain line of railroad in said State known as the Winona & St. Peter railroad, and were so acquired by said railroad company to aid in the construction of said line of railroad under the act of Congress entitled "An act making a grant of lands to the Territory of Minnesota in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State, and granting certain lands to railroad companies therein named," approved March 3d, 1857, and acts amendatory thereof, and certain acts of the late Territory and present State of Minnesota passed in the execution of the trust created by said act of Congress; that in and by chapter 2 of an act of the Minnesota legislature entitled "An act to execute the trust created by an act of Congress entitled 'An act making a grant of land to the Territory of Minnesota in alternate section- to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State, and granting certain lands to railroad companies therein named,'" approved May 22nd, 1857, the said Territory (now State of Minnesota) duly contracted with the Transit Railroad Company, a railroad corporation by it created, that the lands to which said company were or should be entitled under said acts were and should thereafter be exempted from all taxation until sold and conveyed by said company.

48 That thereafter, in 1862, the Winona & St. Peter Railroad Company, a corporation duly created under and by virtue of the laws of said State, duly succeeded to and became possessed of all the rights, benefits, privileges, property, franchises, and interests of the Transit Railroad Company, including that to said lands and the contract of exemption aforesaid.

That the lands hereinbefore described were never prior to 1887 sold and conveyed by said Winona & St. Peter Railroad Company.

That in 1887 said lands were acquired from said last-named railroad company by the Winona & St. Peter Land Company, which relied on said contract.

That the enforcement of the taxes and penalties in question against said lands and the authority of said State and the tax laws thereof is in violation of said contract and an impairment thereof, and said authority and laws, if held applicable to said lands and valid by this court and the taxes claimed thereunder enforced against said lands, then defendant specifically avers that the same are and will constitute an impairment of the obligation of a contract, contrary to the requirements of section 10 of article one of the Constitution of the United States, the protection of which this defendant hereby claims.

That by reason of said exemption said lands were not, nor was any tract thereof, subject to taxation for any of the years prior to 1887 for which taxes are now sought to be enforced against the same.

II.

It appears from the delinquent list filed with the clerk of the said court and published that delinquent taxes and penalties are sought to be enforced against some of said lands which accrued, if at all, more than six years before the commencement of these pro-
49 ceedings, and the answer makes the point and insists that all taxes, delinquent taxes and penalties, and rights of taxation which accrued more than six years before the commencement of proceedings to enforce the same are barred by the statute of limitations and cannot be enforced in these proceedings or otherwise against the lands.

See sec. 12, chap. 66, Gen. Statutes.

San Francisco *vs.* Jones, 20 Fed. Rep., 188.

III

For a third and further objection to the enforcement of the said alleged delinquent taxes and penalties against said lands, the answer of the said Winona & St. Peter Land Company alleges, on information and belief, that said lands were not nor was any tract thereof ever assessed for taxes in the mode and manner required by law for the assessment of taxes against real estate for any year or years for which taxes are now claimed against the same, nor were said lands or any of the same entered upon the tax-list or duplicate for said years or any year, as required by law in such cases.

IV.

The answer makes the following further specific points and objections in respect to certain specified tracts of land, to wit:

1st. In respect to the several tracts in section twenty-one (21), township one hundred and eleven (111), range thirty-five (35), it appears from the published list that taxes are claimed upon the same twice for the year 1885, which, of course, cannot be allowed.

2d. If taxes and penalties are to be claimed on the lands in section thirty-five (35), township one hundred and eleven (111), range thirty-five (35), for the year 1876, the objection is made that they are not described and embraced in the advertised list, so as to justify any judgment against the same for delinquent taxes for that year.

3d. If taxes are to be claimed against section three (3), township one hundred and nine (109), range thirty-six (36), for the year 1885, the objection is made that in the advertised list no claim is made against said section for delinquent taxes for that year, but instead thereof for the year *1685*.

4th. If taxes are claimed for the years 1876 and 1877 on east one-half (E. ½), south one-half (S. ½) of southwest one-quarter (S. W. ¼), northeast one-quarter (N. E. ¼) of southwest one-quarter (S. W. ¼), and east half (E. ½) of northwest one-quarter, section twenty-nine (29), township one hundred and nine (109), range thirty-six (36), the point and objection is made that the same cannot be enforced for the reason that said lands are not described in the advertised list, so as to justify any judgment against the same for the taxes of those years.

If these are the lands intended in said published list, they are erroneously described as being in range thirty-three (33).

5th. In respect to south half (S. ½) of southeast quarter (S. E. ¼) and south half (S. ½) of southwest quarter (S. W. ¼), section twenty-one (21), township one hundred and ten (110), range thirty-six (36), on which taxes are claimed for the years 1869, 1870, 1871, 1872, and 1873, the same cannot be enforced for the reason that said lands were not conveyed by the State to the Winona & St. Peter Railroad Company until May 30th, 1874.

6th. In respect to southwest quarter (S. W. ¼) of northwest quarter (N. W. ¼), section twenty-three (23), township one hundred and ten (110), range thirty-six (36), if taxes against the same are claimed for the years 1869, 1870, 1871, 1872, and 1873, or either of said years, the same cannot be enforced for the reason that in the advertised list no delinquent taxes thereon are claimed for said years.

7th. In respect to the northwest one-quarter (N. W. ¼) of section twenty-nine (29), township one hundred and ten (110), range thirty-six (36), if taxes are claimed against the same for the years 1874 to 1886, inclusive, or for either of said years, the same cannot be enforced in these proceedings for the reason that in the advertised list no claim for taxes is made against said land for said years.

8th. If taxes are claimed for the year 1877 against the subdivisions in section twenty-three (23), township one hundred and eleven (111), range thirty-six (36), the same cannot be enforced because in the advertised list no claim for taxes of that year seems to be made against the same. In said published list, if said tracts are intended, they are described as being in section thirteen instead of section twenty-three (23).

9th. In respect to south half (S. ½) of northeast quarter (N. E. ¼) and northwest quarter (N. W. ¼) of section three (3), township one

hundred and eleven (111), range thirty-seven (37), the point of objection is made against the right to enforce any taxes against the same for the years 1869, 1870, and 1871, for the reason that said lands were not conveyed by the State to the said railroad company until February 26, 1872, and therefore, under no circumstances, were subject to taxation prior to the latter date.

J. M. GILMAN,
Att'y for said Land Co.

52 STATE OF MINNESOTA, } ss:
County of Ramsey, }

J. M. Gilman, being duly sworn, deposes and says that he is the attorney for the Winona & St. Peter Land Company in the matter referred to in the foregoing answer, and that the foregoing answer is true to the best of his knowledge, information, and belief; that none of the officers of said company are now in said county of Ramsey, where this deponent resides, which is the reason this verification is made by deponent.

J. M. GILMAN.

Subscribed and sworn to before me this 7th day of March, 1888.
[SEAL.] HERMAN HANF, JR.,
Notary Public, Ramsey County, Minn.

53 EXHIBIT "W."

Agreement Between A. H. Barney et al. and the Winona & St. Peter Railroad Company.

Memorandum of an agreement, made the thirty-first day of October, one thousand eight hundred and sixty-seven, by and between Danford N. Barney, Jessie Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, Charles F. Latham, Ashbel H. Barney, Samuel N. Hoyt, and Alfred M. Hoyt, parties of the first part, and the Winona & St. Peter Railroad Company, party of the second part.

Whereas, the said parties of the first part have, at and upon the request of the said party of the second part, loaned and advanced large sums of money to the party of the second part, and made, constructed and equipped one hundred and five miles of the railroad of the said party of the second part in the State of Minnesota, and the said party of the second part is indebted to the said parties of the first part in a large sum of money on account thereof:

And whereas, the said parties have agreed upon the terms of liquidation, settlement and payment of all such indebtedness, and the adjustment of the matters between them on the terms hereinafter stated:

And whereas, the said party of the second part hath heretofore issued and delivered to the said parties of the first part its first-mortgage bonds on said road for two millions one hundred thousand dollars, in part payment of such indebtedness:

Now the said party of the second part hath agreed, and doth hereby agree, in further part payment and satisfaction of such indebtedness, to issue to the said parties of the first part four hundred thousand dollars of the full-paid capital stock of its said company, and will also make, execute and deliver to the said parties of the first part twelve hundred and sixty bonds or obligations of the said party of the second part, which said twelve hundred and
54 sixty bonds shall bear date respectively on the first day of November, one thousand eight hundred and sixty-seven, and be for one thousand dollars each, payable forty years from said date, and bear interest at the rate of seven per cent. per annum, payable semi-annually in the city of New York; and that the said twelve hundred and sixty bonds, to be issued as aforesaid, shall be part of a series of eighteen hundred bonds of one thousand dollars each, all of which shall bear interest and be payable as aforesaid, and all of which shall be equally secured by a deed of trust or mortgage, to be executed by the said Winona & St. Peter Railroad Company to Samuel J. Tilden, as trustee, conveying the railroad of the said last-named company from Winona westwardly to the Minnesota river, a distance of one hundred and fifty miles, more or less, as such railroad has been or shall hereafter be constructed, together with the equipments and appurtenances thereof, subject only to the prior lien of a certain other deed of trust or mortgage heretofore executed by said Winona & St. Peter Railroad Company to H. N. Stockwell and Jesse Hoyt, trustees, to secure the payment of first-mortgage bonds of said last-named company, issued and to be issued to the aggregate amount of three millions of dollars. And it is hereby expressly provided, that the bonds herein agreed to be issued as aforesaid, shall be issued only at the rate of twelve thousand dollars per mile of the portion of the Winona & St. Peter railroad constructed at the time of issuing the same, the distance now constructed, and in respect to which the said twelve hundred and sixty bonds sold or agreed to be sold as aforesaid, shall be issued, being one hundred and five (105) miles. And it being understood and agreed that the remaining five hundred and forty bonds
55 shall be issued only from time to time as the work of constructing said railroad shall progress, at such times and in such manner that the aggregate amount of bonds of the series of eighteen hundred bonds aforesaid, which shall be at any time outstanding, shall not exceed the proportion of twelve thousand dollars per mile of such series of bonds for each mile of the said Winona & St. Peter railroad which shall be at such time constructed.

And whereas, the said party of the second part is or claims to be entitled to have and receive, under the several acts of Congress passed in aid of the construction of the said railroad, a certain number of acres of land, supposed to be about six hundred thousand acres, for constructing the portion of said road now constructed, to wit: one hundred and five miles of railroad:

Now for the residue of the said indebtedness of the said party of the second part to the said parties of the first part, the said party of

the second part hath agreed to sell and convey to the said parties of the first part, as many acres of land heretofore granted by Congress to the State of Minnesota, as the said party of the second part shall receive from the said State by reason of the construction of the portion of the Winona & St. Peter railroad heretofore constructed, to wit: one hundred and five miles thereof extending westwardly from Winona, excepting and reserving, nevertheless, any and all parts and parcels of such lands (if any such there be) which may be necessary for the track of said railroad, or the right of way, or any depot or depot grounds thereof, or any other purpose incidental to the operation of the said railroad constructed, or to be constructed, or any part thereof; which said lands hereinbefore agreed to be sold shall be conveyed to the said parties of the first part, or
56 as they shall in writing direct, whenever and as soon as the said party of the second part shall obtain the title thereto under such acts of Congress. The lands to be conveyed as aforesaid shall be selected as follows:

Beginning at Winona aforesaid, and from thence proceeding on each side of the said railroad on a course running parallel therewith, and embracing each of the six, ten, fifteen and twenty mile limits of the congressional land grants, and in proceeding taking all lands within each and all of said limits which shall be received by the said company, under said acts of Congress, or either of them; it being understood, that on each side of said railroad a uniform line of advance westwardly, embracing all the lands in said limits shall be maintained as nearly as may be, until as many acres shall have been selected and taken as the said company shall have received for the construction of the portion of said railroad now completed, which is estimated to be one hundred and five miles thereof, extending northerly and westerly from Winona aforesaid; it being understood that the said parties of the first part shall receive as many acres as shall be received by the party of the second part for the construction of said one hundred and five miles, or so much thereof as is now constructed, notwithstanding that under the acts of Congress the said lands are certified only upon the completion of sections of not less than ten miles of railroad, but reserving, excepting and deducting from the said number of acres all lands necessary for the track of said railroad, or the right of way, or depots or depot grounds, or other purposes incidental to the operation of said railroad.

And the said party of the second part agrees to acquire
57 the title of said lands as fast as it may be permitted to do under said acts of Congress, and to release and convey to the said parties of the first part, or to such person or persons in such manner, and from time to time, as may be devised by the said parties of the first part, or their counsel, on the request of the said parties of the first part, or a majority of them, and will do any and every other act and thing necessary and proper to secure the said parties of the first part said lands and every part and parcel thereof, and the proceeds thereof, if it shall be hereafter determined that the same shall be sold by the said party of the second part, for the ben-

efit of the said parties of the first part; and until the final arrangements shall be made in reference thereto, the title shall be held by the said party of the second part; and as some time is necessary to enable said parties of the first part to confer and agree upon the details in relation to the holding of the title and the mode of disposing of said lands, this clause is inserted to express the agreement of said parties in relation thereto.

And it is further agreed by and between the parties hereto, that the said parties of the first part shall have and take all the cash assets of the said party of the second part, up to the first day of November, 1867, and that the said parties of the first part shall assume and agree to pay, and that they shall fully pay and discharge all the floating debts of the said party of the second part up to the said first day of November, 1867, and all liabilities thereof to that date, except bonded debt, and including the interest to the said first day of November, 1867, which shall have accrued upon the outstanding bonds of the party of the second part, and which will amount at said date to the sum of forty-nine thousand dollars.

58 And the said parties of the first part hereby covenant, promise and agree, to and with the said party of the second part, that the said parties of the first part shall and will receive and accept the property and things hereinbefore agreed to be transferred to them in full payment, satisfaction and discharge of all indebtedness of the said party of the second part to the said parties of the first part, or either of them.

And it is hereby further declared and agreed, that it shall be optional with the said party of the second part whether or not the said party of the second part shall construct the said railroad to any point beyond that to which it is now completed; but if the said party of the second part shall not, on or before the first day of February, 1869, resolve to undertake the construction of said railroad to the first crossing of the Minnesota river, at or near Mankato, a distance of about twenty-four miles, and notify the said parties of the first part, or some of them, that it will undertake such construction, the said parties of the first part shall then, to wit: from and after the said first day of February, 1869, become entitled and be suffered and permitted, at their own election, to undertake the construction of said road to the said first crossing at or near Mankato aforesaid, and to complete the same within fifteen months from the said first day of February, 1869, at the proper cost and expense of the parties of the first part, but for the use and benefit of the party of the second part, upon the terms following, that is to say: the said party of the second part electing not to construct said railroad to the said first crossing, at or near Mankato aforesaid, and the said parties of the first part, within fifteen months from the said first day of February, 1869, undertaking such construction as aforesaid, the said party of the second

59 part shall issue and deliver to the said parties of the first part, from time to time, as the work of construction shall progress, the first-mortgage bonds aforesaid, at the rate of twenty thousand dollars in amount thereof, and the sinking-fund

bonds aforesaid at the rate of twelve thousand dollars in amount thereof, for each mile of the said railroad which shall be constructed by the said parties of the first part as aforesaid, in addition to the one hundred and five miles now completed, until the said railroad shall be completed to the first crossing aforesaid; and upon the completion thereof by the party of the first part to the first crossing aforesaid, provided the same shall be so completed by the first day of May, one thousand eight hundred and seventy, said parties of the first part shall become entitled to receive from the party of the second part the same number of acres of land which the said party of the second part shall receive under the said acts of Congress for the construction of said railroad from the point to which it is now completed to the said first crossing, except such lands as shall be required for railroad purposes, as hereinbefore provided in regard to the one hundred and five miles now constructed; which lands to be conveyed as aforesaid to the parties of the first part, upon the completion of said road by them to the said first crossing, shall be selected in the same manner as hereinbefore provided in respect to the lands hereinbefore agreed to be conveyed to the parties of the first part, or for their benefit, for the construction of said one hundred and five miles; and all the provisions hereof, in respect to the lands which may be received for the construction of the said one hundred and five miles, shall apply to the lands which may be received for the construction of said additional twenty-four miles: Provided, always, that the said parties of the first part, undertaking the construction of said twenty-four miles, shall construct, complete and equip the same in such a manner that the condition thereof, upon the average, shall be in all respects equal, including equipment, to the average condition of the one hundred and five miles heretofore constructed, with the exception only that the said parties of the first part shall not be obliged to erect elevators thereon.

And provided further, that the said parties of the first part, undertaking the construction of said railroad beyond the point to which it is now completed, and receiving therefor the bonds aforesaid, shall indemnity and save harmless the party of the second part from all costs, charges, expenses, damages and liabilities of such construction.

And it is hereby further declared and agreed, that either party hereto, undertaking the construction of said railroad to the first crossing aforesaid, shall complete the same by the first day of May, one thousand eight hundred and seventy.

And it is hereby further declared and agreed, that if the said parties of the first part shall build the said extension of the said railroad to the said first crossing as aforesaid, pursuant to this agreement, the said party of the second part shall allow them to use the track of the constructed portions of said railroad to transport, free of charge and by the proper motive power, locomotives, cars, and other rolling stock, and the proper agents, employees and servants of the parties of the first part, and at their expense, all materials

used in such construction, and all workmen employed in
61 making the same, under and subject to such reasonable rules and regulations in respect to running trains over the said railroad, or any part thereof, as shall be from time to time prescribed by the said party of the second part, or the proper officer or officers thereof. And provided further, that such use of said track shall not impede or interfere with the ordinary business of said railroad; and that the said parties of the first part shall indemnify and save harmless the party of the second part from and against all loss and damage from any cause arising out of the use of said track by the said parties of the first part as aforesaid.

And it is hereby further declared and agreed, that after the completion of the said railroad to the first crossing aforesaid, it shall be optional with the party of the second part whether it shall construct the said railroad from the said first crossing to the second crossing of the Minnesota river, being about twenty-eight miles, more or less, (including the bridge over the first crossing); but if the said party of the second part, shall not within the period of one year from the completion of said railroad to the first crossing, resolve to undertake the further construction of said road to the second crossing aforesaid, then, to wit: after the expiration of the period of one year from the time of the completion of said road to the said first crossing, the said parties of the first part shall become entitled, and shall for the further period of one year, possess the option, to undertake to construct the said railroad from the said first crossing to the said second crossing, at the proper cost and expense of the parties of the first part, but for the use and benefit of the party of the second part, upon the terms following, that is to say: the said
62 party of the second part electing not to construct said railroad to the said second crossing, the said parties of the first part, thereupon, within one year from the time of being notified of such election, undertaking the construction thereof, the said party of the second part shall issue and deliver to the said parties of the first part, from time to time, as the work of construction shall progress, the same amount of bonds per mile as hereinbefore provided in respect to the construction of said road to the said first crossing; and all the provisions, conditions and agreements herein contained in respect to the construction of the said road to the said first crossing, so far as the same are applicable, excepting hereinafter otherwise provided, shall apply equally to the construction thereof to the second crossing; and if the said railroad shall be constructed from the first to the second crossing by the parties of the first part as aforesaid, and completed within the period hereinafter mentioned, the said parties of the first part shall thereupon become entitled to receive, from the party of the second part, the same number of acres of land which the said party of the second part shall receive under said acts of Congress for the construction of said road from the said first to the said second crossing; and all the provisions hereof in respect to the lands to be received for the construction of said one hundred and five miles, shall

apply to the lands to be received for the construction of said railroad from the first to the second crossing.

And it is hereby further declared and agreed, that either party undertaking the construction of said road from the first to the second crossing, shall complete the same within three years from the time of the completion of the said road to the said first crossing.

63 And it is further understood and agreed that if the said parties of the first part shall undertake the construction aforesaid, they shall, if the party of the second part shall so elect, construct the said railroad to a point on the northerly side of the Minnesota river which the said party of the second part shall designate, and which shall not be more than twenty-eight miles distant from the said first crossing, with the same effect, so far as the provisions of this agreement are concerned, as if such party constructed the same to the said second crossing; provided such construction to said point be made within the same time and in the same manner as hereinbefore provided in respect to the construction to the said second crossing.

And the said party of the second part further agrees, in consideration aforesaid, that it will not, at any time hereafter, encumber by mortgage or otherwise the said lands hereinbefore described, and which, by the terms of this agreement, are to be conveyed to the parties of the first part, or as they shall direct.

And the said parties of the first part further agree that all the expenses of procuring title to such lands, and the expenses of any and all conveyances which shall be made of said lands shall be paid by the parties of the first part.

In witness whereof the said parties of the first part have hereunto set their hands and seals, and the said party of the second part has caused its corporate seal to be hereunto annexed, and the same to be attested by the signatures of its president and treasurer, the day and year first above written.

(Signed) D. N. BARNEY. [SEAL.]
WM. G. FARGO. [SEAL.]
64 ANGUS SMITH. [SEAL.]
ALFRED M. HOYT. [SEAL.]
SAMUEL N. HOYT. [SEAL.]
By A. M. HOYT, *Att'y.*
BENJ. P. CHENEY, [SEAL.]
By A. H. BARNEY, *Att'y.*
C. F. LATHAM, [SEAL.]
By D. N. BARNEY, *Att'y.*
JESSE HOYT. [SEAL.]
(W. & ST. P. R. R. CO. SEAL.) WINONA & ST. PETER RAILROAD COMPANY,
By GEORGE L. DUNLAP, *President.*

Sealed and delivered in the presence of—
CHARLES NETTLETON.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on the eighteenth day of December, A. D. one thousand eight hundred and sixty-seven, before me, the undersigned, Charles Nettleton, a commissioner resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the State of Minnesota to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared Danford N. Barney, William G. Fargo, Angus Smith, Alfred M. Hoyt, and Ashbel H. Barney, personally to me known to be five of the same persons described in and who executed the foregoing instrument of writing, and severally acknowledged to me that they had executed the same as their and each of their free and voluntary act and deed in their own behalf and for the uses and purposes therein mentioned; and on the same day also before me again personally appeared the said
65 Alfred M. Hoyt, personally known to me to be the attorney-in-fact of Samuel N. Hoyt, one of the persons described in and who executed the foregoing instrument of writing by said attorney, and the said Alfred M. Hoyt acknowledged to me that he had, as such attorney, executed the same instrument as the free and voluntary act and deed of the said Samuel N. Hoyt, and for the uses and purposes therein mentioned; and on the same day also before me again personally appeared the said Ashbel H. Barney, personally known to me to be the attorney-in-fact of Benjamin P. Cheney, one of the persons described in and who executed the foregoing instrument of writing, by his said attorney, and the said Ashbel H. Barney acknowledged to me that he had, as such attorney, executed the same instrument as the free and voluntary act and deed of the said Benjamin P. Cheney, and for the uses and purposes therein mentioned; and on the same day also before me again personally appeared the said Danford N. Barney, personally known to me to be the attorney-in-fact of Charles F. Latham, one of the persons described in and who executed the foregoing instrument *in* writing by his said attorney, and the said Danford N. Barney acknowledged to me that he had, as such attorney, executed the same instrument as the free and voluntary act and deed of the said Charles F. Latham, and for the uses and purposes therein mentioned.

And on the same day also before me personally appeared George L. Dunlap, to me personally known to be the president of the Winona and St. Peter Railroad Company, described in and who executed the foregoing instrument of writing by said George L. Dunlap, as president, and the said George L. Dunlap, being by me
66 duly sworn according to law, did depose and say that he resided in the city of Chicago, county of Cook, State of Illinois; that he was president of the said Winona and St. Peter Railroad Company; that he knew the corporate seal of the said company; that the seal affixed to the foregoing instrument, purporting to be the seal of said company, was such corporate seal; that it was so affixed by order of the board of directors of said railroad com-

pany, and that he signed his name thereto by the like order as president of said company; and he also acknowledged to me that he had executed the said instrument as the free and voluntary act and deed of the said Winona and St. Peter Railroad Company, for the uses and purposes therein mentioned.

And on this sixth day of January, A. D. one thousand eight hundred and sixty-eight, also before me personally appeared Jesse Hoyt, personally to me known to be one of the same persons described in and who executed the foregoing instrument of writing, and he acknowledged to me that he had executed the same as his free and voluntary act and deed, and for the uses and purposes therein mentioned.

[SEAL.] In witness whereof I have hereunto set my hand and affixed my official seal this 6th day of January, A. D. 1868.

(Signed) CHARLES NETTLETON,
Commissioner for Minnesota in New York.

67 EXHIBIT "E."

Final Decree of the U. S. Circuit Court.

United States Circuit Court, District of Minnesota.

ASHBEL H. BARNEY *et al.*
vs.
THE WINONA & ST. PETER R. R. Co.

The original decree in this action, entered at the December term of this court, 1880, to wit, on the 13th day of April, 1881, having been modified on appeal to the Supreme Court of the United States, and this court having undertaken to execute the mandate of the said Supreme Court by a decree modifying said original decree, entered at the June term of said court, 1885, to wit, on the 6th day of October, 1885, and the complainants having appealed from said modified decree to the Supreme Court of the United States, by which said last-named modified decree was reversed, and the mandate of said Supreme Court having been filed in the office of the clerk of this court, whereby fifteen thousand acres and forty-five hundredths of an acre, in addition to the lands used for the track of the Winona & St. Peter Railroad Company for depots and other purposes
68 necessary and incident to its operation, are ordered to be deducted from the number of acres to a conveyance of which from the defendants, The Winona & St. Peter Railroad Company, to the plaintiffs or such persons as a majority of them may appoint, by the aforesaid decree of this court, made at its December term, 1880, the plaintiffs were adjudged to be entitled, and a majority of the plaintiffs having requested that the conveyance of said lands be made to the Winona and St. Peter Land Company, a corporation organized under the laws of the State of Minnesota, and all the heirs-at-law and successors in interest of certain complainants herein deceased having been made parties to this suit:

Now, therefore, it is ordered and decreed that the defendant, The Winona & St. Peter Railroad Company, specifically perform the contract in suit, and do convey forthwith to the Winona & St. Peter Land Company, as a majority of the plaintiffs and a majority of the obligees in said contract have requested, in addition to the lands already conveyed, the lands in the said original decree, made at the December term, 1880, and the list and descriptions subjoined thereto, specifically described, being one hundred and ninety-seven thousand one hundred and eleven acres and sixty and one-half hundredths of an acre, less and except fifteen thousand acres and forty-five hundredths of an acre, to wit, that the said defendants do convey to the said Winona & St. Peter Land Company the lands, a correct description of which by sections, townships, and ranges is contained in the subjoined list and description marked "Schedule A," but excepting from said conveyance all lands used for the track
69 of said railroad, to wit, a strip of land across each of said lands crossed by said railroad fifty feet in width on each side of the center line of the main track of the Winona & St. Peter railroad as the same is now located and constructed, and any greater width, not exceeding one hundred feet in width upon each side of said center line, where necessary permanently to include all cuts, embankments, and ditches and other works of said company necessary to secure and protect its main line of railroad, and all depot grounds at the several stations, and lands used for other purposes necessary and incident to the operation of said railroad, the same to be described by metes and bounds or other suitable description, and included in the exception to the grant of any section in which any of said lands are situated; and it is further ordered and decreed that the complainants do recover of the defendant their costs and disbursements, to be taxed by the clerk.

R. R. NELSON, *Judge.*

St. Paul, March 7, 1887.

(Here follows Exhibit "A," giving a description of the lands, including the lands described in the petition and involved in these proceedings.)

Endorsed: 7674. State of Minnesota *vs.* Winona & St. Peter Land Company. Tax case certified from Redwood county. Filed Dec. 13, 1888. J. D. Jones, clerk.

70 STATE OF MINNESOTA, } ss:
Supreme Court, }

THE STATE OF MINNESOTA, Respondent,

vs.

CERTAIN LANDS IN REDWOOD COUNTY FOR TAXES REMAINING Delinquent and Unpaid Thereon on the First Monday of January, 1888; The Winona & St. Peter Land Company, Appellant.

Know all men by these presents — we, The Winona & St. Peter Land Company, as principal, and M. G. Norton and Henry C.

Balcom, as sureties, are held and firmly bound unto said respondent, The State of Minnesota, in the full and just sum of two thousand dollars ($2,000); to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas, at a general term of the said supreme court of the State of Minnesota, in a suit depending in said court between The State of Minnesota, as plaintiff and respondent, and The Winona & St. Peter Land Company, as defendant and appellant, judgment was rendered against said defendant, and the said defendant having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said plaintiff and its attorneys, citing and
71 admonishing them to be and appear at the Supreme Court of the United States, at Washington, on the 12th day of July, A. D. 1891, next:

Now, the condition of the above obligation is such — if the said defendants shall prosecute its said writ of error to effect and answer all costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and effect.

THE WINONA & ST. PETER LAND COMPANY, [SEAL.]
[SEAL.] By H. W. LAMBERTON, [SEAL.]
Land Commissioner.
H. C. BALCORN. [SEAL.]
M. G. NORTON. [SEAL.]

STATE OF MINNESOTA, } ss:
County of Winona, }

Be it known that on this 10th day of June, A. D. 1891, before me, a notary public, personally appeared Henry W. Lamberton, land commissioner of the above-named defendant, and M. G. Norton and Henry C. Balcorn, to me known to be the same persons described in and who executed the foregoing instrument, and each for himself acknowledged the same to be his own free act and deed.

JAMES A. TAWNEY,
[SEAL.] *Notary Public, Winona County, Minn.*

STATE OF MINNESOTA, } ss:
County of Winona, }

Henry W. Lamberton, M. G. Norton, and Henry C. Balcorn, the persons named in and who executed the foregoing bond as sureties, being first duly sworn, *doth* depose and say that *he is a* resi-
72 dent and freeholder of the State of Minnesota and worth the amount of two thousand dollars ($2,000) above *his* debts and liabilities and exclusive of *his* property exempt from execution.

_____.
M. G. NORTON.
H. C. BALCORM.

Subscribed and sworn to before me this 10th day of June, A. D. 1891.

JAMES A. TAWNEY,
Notary Public, Winona County, Minn.

[SEAL.]

I hereby approve of the foregoing bond and the sureties thereon.

JAMES GILFILLAN,
Chief Justice Supreme Court, State of Minnesota.

Endorsed: 5674. Original. U. S. Supreme Court. The State of Minnesota, respondent, against The Winona and St. Peter Land Company, appellant. Bond. J. A. Tawney, attorney for appellant, Winona, Minn. Filed June 12, 1891. C. P. Holcomb, clerk.

73 STATE OF MINNESOTA:

Supreme Court.

THE STATE OF MINNESOTA, Plaintiff and Respondent,
vs.
CERTAIN LANDS IN REDWOOD COUNTY FOR TAXES REMAINING Delinquent and Unpaid Thereon the First Monday of January, 1888; The Winona & St. Peter Land Co., Defendant and Appellant.

To the Honorable James Gilfillan, chief justice of the supreme court of the State of Minnesota:

The petition of the Winona & St. Peter Land Company respectfully shows that on the 11th day of July, A. D. 1889, the supreme court of the State of Minnesota, in and by the final judgment entered thereof on that day, in a certain action, wherein The State of Minnesota was plaintiff and your petitioner was defendant, affirmed in part a judgment made in that action or proceeding by the district court for the county of Redwood, in said State, *in said State* in favor of said plaintiff and against said defendant, and entered on the 19th day of September, A. D. 1888, which judgment of said supreme court finally and conclusively adjudicates and determining that said plaintiff is entitled to recover from the lands described in the complaint in said action and owned by said defendant all the taxes assessed and levied against the same for six years prior to the date of the commencement of said action, subject only to a review by the Supreme Court of the United States, as will more fully appear by reference to the records and proceedings in said action; that the taxes so levied and included in said
74 judgment against the lands of said defendant amount in the aggregate to forty-one thousand five hundred eighteen and twenty-six one-hundredths dollars ($41,518.26).

That said supreme court of the State of Minnesota is and then was the highest court in said State in which a decision in said action could be had; that your petitioner claims the right to remove said judgment to the Supreme Court of the United States by a writ of error under section 709 of the Revised Statutes of the

United States, because in said action a title, right, privilege, and immunity was claimed by your petitioner in bar of said action under the fifth amendment to the Constitution of the United States and under section ten of article one of the Constitution of the United States—that is to say, there was pleaded and proven as a defence in said action certain acts of Congress granting certain lands to the State of Minnesota to aid in the construction of certain railroads in said State and a certain contract between the Territory (now State) of Minnesota and the Transit Railroad Company by it created and one of the railroad companies entitled to a portion of the lands so granted by Congress, whereby said lands were and should thereafter be exempt from taxation until sold and conveyed by said company.

That thereafter the Winona & St. Peter Railroad Company, a corporation duly created under and by virtue of the laws of said State, duly succeeded to and become possessed of the rights benefits, property, franchise, and interests of the said Transit Railroad Company, including that to said lands and the contract of exemption aforesaid.

75 That said lands were conveyed to your petitioner, and your petitioner obtained title thereto from said last-named railroad company, the same having been certified to the State for its benefit under said acts of Congress, and that the taxes included in said judgment against said lands were all assessed and levied prior to said conveyance by said railroad company to your petitioner; that the enforcement of the said taxes against said lands and the authority of said State and the tax laws thereof is in violation of said contract and an impairment thereof, contrary to the section and article of the Constitution of the United States last above referred to, and your petitioner is advised and verily believes that such consideration, faith, and credit was not given to said provisions of the Constitution of the United States and to the said contract between the said State of Minnesota and the said railroad company by the said judgment of the supreme court of the State of Minnesota as their provisions expressly require, all of which will more fully appear by the records and proceedings in said action, to which reference is hereby made.

Wherefore your petitioner prays the allowance of a writ of error, returnable to the Supreme Court of the United States, and for citation; and your petitioner will ever pray.

JAMES A. TAWNEY,
Attorney for Petitioner.

STATE OF MINNESOTA, } ss:
County of Winona, }

Henry W Lamberton came before me personally and, being duly sworn, doth depose and say that he is laid commissioner of the defendant above named; that he has read the foregoing petition, and

that the same is true to his own knowledge except as to the
76 matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

HENRY W. LAMBERTON.

Subscribed and sworn to before me this 10th day of June, A. D. 1891.

[SEAL.] JAMES A. TAWNEY,
Notary Public, Winona County, Minn.

Writ of error allowed as within prayed for.
Dated June 12th, 1891.

JAMES GILFILLAN,
Chief Justice Supreme Court of Minnesota.

Endorsed: 5674. United States Supreme Court. The State of Minnesota, respondent, against The Winona & St. Peter Land Company, appellant. Petition. J. A. Tawney, attorney for appellant, Winona, Minn. Filed June 12, 1891. C. P. Holcomb.

77 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court of the State of Minnesota, before you or some of you, being the highest court of law or equity in which a decision could be had in a said suit between The State of Minnesota, plaintiff and respondent, and The Winona & St. Peter Land Company, defendant and appellant, wherein is drawn a question of construction of a clause of the Constitution of the United States, and also wherein is drawn in question the validity of an authority exercised under a statute of the State of Minnesota, which was and is claimed to be repugnant to the Constitution of the United States, and the decision was against the title, right, privilege, immunity, and exemption specially set up or claimed under such clause of the Constitution and in favor of such authority, a manifest error hath happened, to the great damage of the said Winona & St. Peter Land Company, as by its petition and pleadings appear, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with anything concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the
same at Washington on the eleventh day of July, A. D. 1891,
78 in the said Supreme Court, that, the record of the proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and

according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 12th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal U. S. Circuit Court, Third Division, Dist. of Minnesota.]

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States
for the District of Minnesota.

79 [Endorsed:] United States of America. The State of Minnesota, plaintiff & respondent, against The Winona & St. Peter Land Company, defendant & appellant. Writ of error. Due service of the within writ of error is hereby admitted this 12th day of June, 1891. Moses E. Clapp, att'ys for respondent. J. A. Tawney, attorney for def't & appellant, Winona, Minn.

80 UNITED STATES OF AMERICA:

To the State of Minnesota and its attorneys, Moses E. Clapp and M. M. Maddigan:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, D. C., on the eleventh (11th) day of July, A. D. 1891, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein The State of Minnesota is plaintiff and respondent and The Winona & St. Peter Land Company is defendant and appellant, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable James Gilfillan, chief justice of the State of Minnesota, this 12th day of June, A. D. 1891.

JAMES GILFILLAN,
Chief Justice.

81 [Endorsed:] United States of America. The State of Minnesota, pl'ff & resp't, *vs.* The Winona & St. Peter Land Company, def't & appellant. Citation. Due service of the within citation is hereby admitted this 12th day of June, 1891. Moses E. Clapp, att'y for pl'ff & respondent. James A. Tawney, att'y for appellant, Winona, Minn.

Endorsed on cover: Case No. 14,732. Minnesota supreme court. No. 221. The Winona & St. Peter Land Company, plaintiff in error, *vs.* The State of Minnesota. Filed July 10th, 1891.

THE LAW ASSOCIATION
OF
PHILADELPHIA